Dipompo v Maspeth Fed. Sav. And Loan Assn.
2018 NY Slip Op 32854(U)
September 5, 2018
Supreme Court, Queens County
Docket Number: 706740/16
Judge: Carmen R. Velasquez
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice

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FRANCIS DIPOMPO,

Plaintiff,

-against-

MASPETH FEDERAL SAVINGS AND LOAN ASSOCIATION d/b/a MASPETH FEDERAL SAVINGS BANK,

Defendant.

----------x

MASPETH FEDERAL SAVINGS AND LOAN ASSOCIATION.

Third-Party Plaintiff,

-against-

TYCO INTEGRATED SECURITY LLC,

Third-Party Defendant.

----------x

Index No. 706740/16

Motion
Date: September 15, 2017

M# 2

The following papers numbered EF 21-40 read on this motion by the third party defendant for an order dismissing the third party complaint pursuant to CPLR 3211(a).

	PAPERS NUMBERED
Notice of Motion - Affidavits - Exhibits.....	EF 21-26
Memorandum of Law in Opposition - Exhibits.....	EF 34-37
Replying Affirmation.....	EF 38-40

Upon the foregoing papers it is ordered that this motion by the third party defendant for an order dismissing the third party complaint pursuant to CPLR 3211(a) is decided as follows:

Third party plaintiff Maspeth Federal Savings and Loan

Association (Maspeth) entered into a contract with third party defendant Tyco Integrated Security LLC (Tyco) pursuant to which the latter provided the former with a high security burglary alarm system, which included interior "hold up" alert buttons, sound and heat detection, and communications with a central monitoring station.

The contract contained a limitation of liability clause which provided: " Tyco is not an insurer. *** Accordingly, Tyco does not undertake any risk that Customer's person or property, or the person or property of others, may be subject to injury or loss if such an event occurs. The allocation of such risk remains with Customer, not Tyco. Insurance, if any, covering such risk shall be obtained by Customer. Tyco shall have no liability for loss, damage, or injury due directly or indirectly to events, or the consequences therefrom, which the system or services are intended to detect or avert. Customer shall look exclusively to its insurer and not to Tyco to pay Customer in the event of any such loss, damage, or injury. Customer releases and waives for itself and its insurer all subrogation and other rights to recover from Tyco arising as a result of paying any claim for loss, damage, or injury of Customer or another person." The limitation of liability clause further provided: "If notwithstanding the provisions of this section E, Tyco is found liable for loss, damage or injury under any legal theory due to a failure of the services, system, or equipment in any respect, its liability shall be limited to a sum equal to 10% of the annual service charge or $1,000, whichever is greater..."

In the early morning hours of Saturday, May 21, 2016, sound sensors in the vault of Maspeth's Rego Park branch were triggered which caused alarm signals to be sent to Tyco's central monitoring station. Tyco called the bank manager and hung up without talking to her or leaving a message, and Tyco did not try to reach other bank employees on a contact list as required. During banking hours Saturday morning, beeping sounds from the alarm system keypad indicated some problem with the vault and the fire exit door in the basement. The branch manager checked the vault and fire door, but found no problems. However, the hold up buttons also began to send signals, and numerous hold up alarms were received at Tyco's central alarm station. The branch manager spoke with someone at Tyco by telephone at around 12:41 PM on Saturday. The Tyco representative told the branch manager that she would place the hold up buttons on test mode so that the police would not be dispatched. Alarm signals received by the central monitoring station while the system is in test mode are recorded by Tyco, but otherwise ignored. Tyco sent a technician to the Rego Park Branch Saturday afternoon, and he assured the

branch manager that he would repair the apparent malfunction. The head of Maspeth security informed the technician that the bank would place an armed security guard at the branch in case he could not fix the apparent malfunction that day, but the technician replied that he would have the system fixed that day. Before leaving, the technician gave the branch manager instructions to arm the alarm system, and the branch manager found that each zone on the alarm keypad (vault, ATM, etc) was fully functional.

According to Tyco's Event History Report, the company placed Maspeth's alarm system on test mode Saturday afternoon where it would remain until 8:00 AM Monday morning. No one from the bank knew about it or consented to have the alarm system placed on test mode for this period, which essentially left the bank without an alarm system over the weekend.

In the early morning hours of Sunday, May 22, 2016, a group of burglars cut a hole through the bank's roof and used torches to cut their way through the ceiling of the vault. They used a ladder to climb down into the vault, and they then disabled the vault's security camera. The burglars broke into the safety deposit boxes, and stole millions of dollars in currency and valuables.

On June 8, 2016, plaintiff Francis DiPompo, a customer of Maspeth whose property was allegedly stolen from rented safety deposit boxes, began the instant action against Maspeth, asserting claims for negligence, gross negligence, breach of contract, and deceptive business practice in violation of General Business Law § 349. Maspeth subsequently began a third party action against Tyco.

The first cause of action asserted by third party plaintiff Maspeth against third party defendant Tyco is for breach of contract. Tyco seeks to have this cause of action dismissed because of the exculpatory clause in its contract with Maspeth.

"As a general rule, parties are free to enter into contracts that absolve a party from its own negligence ... or that limit liability to a nominal sum ..." (*Abacus Fed. Sav. Bank v ADT Security. Services., Inc.*, 18 NY3d 675, 682-683.) As a matter of public policy, however, exculpatory or limitation of liability clauses generally cannot be enforced by a party who has been grossly negligent. (*Abacus Fed. Sav. Bank v ADT Security. Services., Inc., supra; see Soja v Keystone Trozze, LLC*, 106 AD3d 1168.) Generally, a party that has been grossly negligent can enforce neither a contract clause purporting to exonerate him

from liability nor a contractual clause limiting damages to a nominal sum. (*Abacus Fed. Sav. Bank v ADT Security*. Services., *Inc. supra; see, Soja v Keystone Trozze, LLC, supra*.)

Abacus Fed. Sav. Bank v ADT Security. Services., *Inc.* (*supra*) is the controlling precedent here. Plaintiff Abacus Federal Savings Bank (Abacus) brought an action against defendant ADT Security Services, Inc. (ADT) and Diebold, Inc. (Diebold) asserting claims in tort and contract arising from a burglary of the bank. After business hours on Saturday, March 20, 2004, burglars broke through a back entrance door and a second interior door. A securty camera recorded that the burglars over a period of several hours found the vault and used blow torches to gain entrance to it. They absconded with the bank's overnight cash and the contents of 20 safe deposit boxes belonging to the bank's customers. The police were not alerted during the course of the burglary, and an employee of the bank discovered discovered the burglary when the bank opened for business on Monday morning, March 22, 2004.

ADT and Diebold had separately contracted with Abacus for the provision of security services for the branch. ADT's contract required it to install and maintain a 24-hour central station security system to protect the premises and the vault. ADT installed detectors that were suppose to identify intruder movement and the presence of smoke, and the security system was supposedly engineered to send any alarm signals triggered in the vault to ADT's central monitoring station. Diebold's contract with Abacus obligated the former to supply a backup alarm system twith central station monitoring, and "signal monitoring," which would activate an alarm if ADT's alarm system malfunctioned.

Abacus alleged that the defendants knew for weeks, if not months, that the security systems were malfunctioning and sending false alarms. There were, for example 17 phone line failures. Abacus alleged that the defendants failed to investigate the malfunctions and failed to notify anyone at the bank of the problem.

The Court of Appeals stated: "Both contracts contained clauses that exculpated defendants from liability for their own negligence and limited their liability, under all circumstances, to $250. Diebold's contract contained a clause entitled "Property Insurance and Waiver of Subrogation" where Abacus agreed to obtain insurance coverage to cover its losses in the event of a theft. The agreement between Diebold and Abacus provided that Abacus 'shall look solely to its insurer for recovery of its loss and hereby waives any and all claims for

such loss against Diebold' and that Abacus' insurance policy would contain a clause providing that such waiver would not invalidate the coverage. There was no similar waiver of subrogation clause in the contract between Abacus and ADT. Instead, their contract merely provided 'that insurance, if any, covering personal injury and property loss or damage' was Abacus' responsibility to obtain." (*Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc.*, 18 NY3d 675, 681.)

The Court of Appeals found that Abacus had sufficiently alleged that the defendants conduct amounted to gross negligence. "Abacus has alleged much more than mere failure to install a proper working alarm system and inspect it. Abacus alleges that both defendants had knowledge, for weeks, if not months, that the equipment had been malfunctioning." (*Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc.*, supra at 683.) The defendants had also failed to notify anyone at the bank of the problems with the security systems. "[O]n this record, plaintiffs have alleged the type of conduct that smacks of intentional wrongdoing and evinces a reckless indifference to the rights of others ..." (*Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc., supra* at 684,)

Despite concluding that Abacus had adequately alleged gross negligence, the Court of Appeals also concluded that the waiver of subrogation clause in Diebold's contract with Abacus provided a complete defense to the bank's causes of action asserted against that defendant. The Court of Appeals reached this conclusion because the contract between Abacus and Diebold required the bank to obtain insurance to cover its losses. The Court of Appeals distinguished between "contractual provisions which seek to exempt a party from liability ... and contractual provisions ... which in effect simply require one of the parties to the contract to provide insurance for all of the parties ..." (*Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc., supra*). The latter type of contractual provision effectively operated to shield the alarm company even in the face of gross negligence.

However, in regard to ADT's contact with Abacus, the Court of Appeals found that the contract "did not require Abacus to obtain insurance to cover losses stemming from ADT's gross negligence. The decision to obtain insurance, 'if any,' was discretionary as to Abacus." (*Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc., supra.* at 684.) The appellate court reinstated the breach of contract cause of action as against ADT. In the case at bar, while Tyco argues that its contract, unlike ADT's, contained an express waiver of a right to recovery, an omission in the ADT contract noted by the Court of Appeals, this court reads the appellate decision as making the requirement to procure

insurance as determinative. The omission noted by the appellate court was "an express waiver by Abacus to waive all rights for damages covered by insurance it may have obtained as against ADT." (*Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc., supra* at 684 [emphasis added].)

In the case at bar, the clause in the contract between Tyco and Maspeth purporting to shield the former from liability is similar to that in the contract between ADT and Abacus, not to that in the contract between Diebold in Abacus. The Tyco/Maspeth contract did not require the bank to purchase insurance covering its losses, since it reads in relevant part: "Insurance, if any, covering such risk shall be obtained by Customer."

The next question presented here is whether Maspeth's cause of action for breach of contract should be dismissed at this stage of the litigation pursuant to CPLR 3211(a)(1) (defense founded on documentary evidence) and CPLR 3211(a)(7) (failure to state a cause of action).

This court finds that it would be premature to dismiss the cause of action for breach of contract before the conclusion of discovery. Maspeth asserts that Tyco was guilty of gross negligence essentially because it disabled the alarm system for an entire weekend without informing anyone at the bank. Tyco deactivated the alarm system by putting it on test mode until Monday morning. This court is of the view that a better record should be made concerning who made the decision to place the system on test mode and on what basis. (*See, Fed. Ins. Co. v Honeywell, Inc.*, 641 F Supp 1560 [issue of material fact preclusive of summary judgment existed concerning whether alarm company was grossly negligent in cancelling service call and subsequently failing to repair client's alarm system during the weekend of a burglary].) Further inquiry should be made concerning whether, under all of the circumstances of this case, Tyco engaged in "the type of conduct that smacks of intentional wrongdoing and evinces a reckless indifference to the rights of others...." (*Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc., supra* at 684.) The court notes that CPLR 3211(d) provides in relevant part: "(d) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion ... or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just." (*see Muncil v Widmir Inn Rest. Corp.*, 155 AD3d 1402.) Tyco may, if it is so advised bring a motion for summary judgment after the conclusion of discovery,

and the court does not determine here whether Maspeth's cause of action for breach of contract can survive a CPLR 3212 motion.

The remaining causes of action asserted by third party plaintiff Maspeth against third party defendant Tyco are for gross negligence, fraudulent misrepresentation, fraudulent omission, negligent misrepresentation, violation of the implied covenant of good faith and fair dealing, common law indemnification, and common law contribution.

Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc., (*supra*) is dispositive of Maspeth's causes of action sounding in tort. The Court of Appeals dismissed the causes of action sounding in tort, even the cause of action for gross negligence, because the complaint did not allege conduct that would give rise to separate liability in tort. Here, the allegation that a breach of contract occurred as a result of gross negligence does not give rise to a duty independent of the contractual relationship. Maspeth's allegations of tortious conduct do not adequately allege the violation of a legal duty independent of the contract. (*see Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382.)

The cause of action for violation of the implied covenant of good faith and fair dealing is duplicative of the cause of action for breach of contract. (*see Fried v Lehman Bros. Real Estate Assocs. III, L.P.*, 156 AD3d 464 [1st Dept 2017].)

Maspeth does not have a cause of action for indemnification against Tyco. "Common-law indemnification is warranted where a defendant's role in causing the plaintiff's injury is solely passive, and thus its liability is purely vicarious ..." (*Balladares v Southgate Owners Corp.*, 40 AD3d 667, 671; *Bivona v Danna & Associates, P.C.*, 123 AD3d 956 ; *Bedessee Imports, Inc. v Cook, Hall & Hyde, Inc.*, 45 AD3d 792.) The plaintiff's case against Maspeth is based on its own alleged wrongdoing, rather than on a theory of vicarious liability. (*see Ferguson v Shu Ham Lam*, 74 AD3d 870.) For example, plaintiff alleges that "[i]t was negligent for Defendant to fail to realize that reasonable security actions, including installing inexpensive wireless alarms, should have occurred." (Complaint, ¶ 67.)

Maspeth does not have a cause of action for contribution against Tyco. In *Board of Education of Hudson City School District v Sargent, Webster, Crenshaw & Folley*, (71 NY2d 21), the Court of Appeals held that contribution is not available where the liability upon which the contribution claim is based arises solely from breach of contract. In the case at bar, Maspeth's claims sounding in tort have been dismissed, and its claim for

contribution can only be based on breach of contract.

Accordingly, the branch of the motion by the third party defendant which is for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the cause of action for breach of contract is denied.

The branches of the motion which are for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the remaining causes of action are granted.

Dated: September 5 , 2018

CARMEN R. VELASQUEZ, J.S.C.

FILED
SEP 10 2018
COUNTY CLERK
QUEENS COUNTY