Rubin v Duncan
2018 NY Slip Op 32934(U)
November 16, 2018
Supreme Court, New York County
Docket Number: 154131/2015
Judge: Paul A. Goetz

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Paul A. Goetz, JSC PART 47

Rubin

-v-

Duncan

INDEX No. 154131/2015
MOTION DATE
MOTION SEQ. No. 004

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause – Affidavits – Exhibits _____ No(s). 1
Answering Affidavits – Exhibits _____ No(s). 2
Replying Affidavits _____ No(s). 3

Plaintiffs commenced the underlying malpractice action against defendants Duncan, Fish & Vogel LLP and one of its principals, Richard E. Fish, seeking to recover damages for defendants' alleged negligent representation of plaintiffs in litigation with Ace Investor LLC in Utah and the subsequent judgment enforcement and turnover proceedings brought by Ace in Utah and in the Southern District of New York. The defendants thereafter filed a motion to dismiss the complaint, which was granted in part by the court. On appeal of this decision as well as the motions to reargue, the First Department held that the Marital Trust was the only plaintiff which had standing to assert the claims in the underlying malpractice action. The First Department also dismissed the claims of the sole remaining plaintiff, the Marital Trust, except to the extent that the Marital Trust's claims were based on: (1) the defendants' alleged failure to obtain credit for the $200,000 plaintiffs paid against the note with Ace; (2) the deposition advice given to Margery Rubin; and (3) the legal fees incurred by plaintiff and its loss of any source of repayment of its loans to the other plaintiffs. Affirmation of Todd Belous dated May 14, 2018, Exh. E.

Subsequently, defendants commenced a third-party action against the third-party defendants, who provided accounting services to the trusts. Specifically, defendants/third-party plaintiffs alleged that the third-party defendants negligently prepared certain tax returns for one or more of the trusts and that the court relied on these erroneous tax returns in entering a judgment against the Marital Trust in the turnover proceeding. Belous Aff., Exh. G, ¶¶ 34-35. Accordingly, defendants/third-party plaintiffs asserted claims against third-party defendants based on contribution and indemnification.

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The third-party defendants now move pursuant to CPLR 3211(a)(1) and (7) to dismiss the third-party complaint. First, the third-party defendants argue that the contribution claim should be dismissed because it is duplicative of the affirmative defense of comparative negligence asserted by defendants in their answer to the complaint which seeks to reduce any damages commensurate to plaintiffs' own negligence and culpable conduct including the conduct of plaintiffs' agents. Belous Aff., Exh. F, ¶ 43. The third-party defendants argue that since defendants seek to impute the acts of the third-party defendants, plaintiffs' accountants, to the plaintiffs themselves and thereby obtain a reduction in damages, the third-party cause of action for contribution is redundant, unnecessary and must be dismissed.

In support, the third-party defendants rely heavily on the First Department's decision in *Hercules Chemical Corp. v. North Star Reinsurance Corp.*, 72 A.D.2d 538 (1st Dep't 1979), in which the court dismissed the third-party contribution claim. The court found that the defendant/third-party plaintiff's affirmative defense of negligence by plaintiff's attorneys adequately protected it against any contributory negligence by the third-party defendants, as any such negligence would be imputed to plaintiff. However, more recently, in *Millennium Import, LLC v. Reed Smith LLP*, 104 A.D.3d 190 (1st Dep't 2013), the First Department reinstated the third-party contribution claim brought by defendant attorneys in an underlying malpractice action against three other law firms which advised the plaintiff or its parent company about the transaction and thereby contributed to its losses. The court held that the contribution claim was not precluded by defendant's affirmative defense of comparative negligence, which does not necessarily afford the defendant law firm "all the protection to which it is entitled." *Id.* at 196. In its decision, the court acknowledged the holding in *Hercules* but found that it should be limited to its facts.

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In their papers, third-party defendants fail to distinguish this case from the facts in *Millennium*. Although the third-party defendants in this case are accountants, and not lawyers, this distinction is not meaningful here as both accountants and lawyers can be held liable for malpractice. Third-party defendants also argue that unlike in *Millennium*, the third-party defendants provided independent accounting advice to the trusts and did not participate concurrently or successively with the defendants in connection with the claims asserted in plaintiff's legal malpractice action. However, under CPLR 1401, a defendant may assert a claim for contribution against not only a joint tortfeasor, but also against "concurrent, successive, *independent, alternative* and even intentional tortfeasors." *Schauer v. Joyce*, 54 N.Y.2d 1, 5 (1981) (emphasis added; internal citations and quotations omitted). The right to contribution exists among persons who are subject to liability in tort for the same injury, which is exactly what defendants/third-party plaintiffs have alleged in their third-party complaint.

Further, defendants' affirmative defense of comparative fault against plaintiffs and their agents may not be sufficient to protect them against the alleged malfeasance of the third-party defendants. The affirmative defense was asserted prior to First Department's decision dismissing all of the plaintiffs with the exception of the Marital Trust. According to defendants, the third-party defendants were retained by the now-dismissed plaintiff Robert M. Rubin to render accounting services, including preparing tax returns for the trusts. Thus, the remaining plaintiff may argue that the third-party defendants were not its agents since it did not retain them to provide accounting services.

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Moreover, the third-party defendants were not employees of the plaintiffs but rather were hired as independent accountants, who were not subject to plaintiffs' actual direction and control. *See Feliberty v. Damon*, 72 N.Y.2d 112, 118 (1988) (holding that insurer which retained outside counsel could not be held vicariously liable for law firm's actions since the firm was an independent contractor which was not subject to the insurer's actual direction and control). Thus, it is uncertain whether the actions of the third-party defendants can in fact be imputed to the remaining plaintiff, and whether the remaining plaintiff can assert a viable defense to such a claim. *Cf. Arbor Realty Funding, LLC v. Herrick, Feinstain LLP*, 2018 WL 1638817 (Sup. Ct. N.Y. Cty. 2018) (distinguishing *Millennium* and relying on *Hercules* to dismiss third-party contribution claim where plaintiff in its motion papers acknowledged responsibility for the actions of the third-party defendants). Accordingly, the cause of action for contribution cannot be dismissed.

With respect to the third-party indemnification claim, it is well-established that "[t]he predicate for common-law indemnity is vicarious liability without fault on the part of the proposed indemnitee, and it follows that a party who has itself participated to some degree in the wrongdoing cannot receive the benefit of the doctrine." *Kagan v. Jacobs*, 260 A.D.2d 442, 442 (2d Dep't 1999). Here, since the defendants/third-party plaintiffs actually participated to some degree in the alleged wrongdoing, they cannot claim indemnification. *Id.* Accordingly, this cause of action must be dismissed.

Accordingly, it is

ORDERED that the motion to dismiss is granted to the extent that the cause of action for indemnification is dismissed, and is otherwise denied; and it is further

ORDERED that the parties shall appear for a conference on January 3, 2019 at 9:30 AM.

Dated: 11/16/18

Hon. Paul A. Goetz, JSC

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