

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

ROCHESTER DRUG CO-OPERATIVE, INC.,

Plaintiff,

v.

MARCOTT PHARMACY NORTH CORP., d/b/a
QUALITY RITE PHARMACY and ROBERT
LEOPOLD,

Defendants.

MARCOTT PHARMACY NORTH CORP., d/b/a
QUALITY RITE PHARMACY and ROBERT
LEOPOLD,

Third Party Plaintiffs,

v.

DELBELLO, DONNELLAN, WEINGARTEN,
TARTAGLIA, WISE & WIEDERKEHR, LLP,

Third Party Defendants.

Third party defendant, DelBello, Donnellan, Weingarten, Tartaglia, Wise & Wiederkehr LLP ("the DelBello firm"), has moved pursuant to CPLR 3211(a)(7) to dismiss the cross claim asserted by defendants/third party plaintiffs, Marcott Pharmacy North Corp. d/b/a Quality Rite Pharmacy and Robert Leopold, for failure to state a cause of action. The DelBello firm also seeks costs on this motion, including court costs and reasonable attorneys' fees.

The primary action was commenced by plaintiff, Rochester Drug Co-operative, Inc., a wholesale vendor of drugs and pharmaceutical products, against its former customer and retail distributor and that company's principal, respectively Marcott Pharmacy North Corp. d/b/a Quality Rite Pharmacy and Robert Leopold ("Marcott" and "Leopold"). Plaintiff's complaint alleges that Marcott obtained certain "goods, wares and merchandise" from plaintiff "on credit," but that Marcott has not paid for those items. Plaintiff's Complaint, ¶¶6,13. Marcott is no longer in business, and Leopold is named as a defendant in an attempt to "pierce the corporate veil." Id. at 20. Plaintiff's complaint states causes of action sounding in breach of fiduciary duty, negligent misrepresentation, presumptive fraud under Debtor and Creditor Law §274, actual fraud under Debtor and Creditor Law §276, as well as a fifth cause of action seeking an accounting. In their verified answer, Marcott and Leopold asserted a cross-claim against the DelBello firm seeking contribution and/or indemnification for any judgment or verdict which might be rendered against them. The Delbello firm represented Marcott in its sale of a drug store and handled all matters related to the closing, including compliance with the UCC, the Bulk Transfer Law, and applicable notices.

In June 2003, the Debello firm moved to dismiss plaintiff's complaint, or, in the alternative, to change venue of this action

from Monroe to Westchester County. The motion to dismiss the claims against the DelBello firm was unopposed, and all of plaintiff's claims asserted against the DelBello firm were dismissed with prejudice by order dated August 27, 2003.

However, as the DelBello firm moved only to dismiss the causes of action asserted against it by plaintiff, the cross claims asserted by Marcott and Leopold against the DelBello firm survived the motion to dismiss. As the DelBello firm was still a party to this action even after the dismissal of Rochester Drug Co-op's claims as against it, the court (Stander, J.) *sua sponte* converted Marcott's and Leopold's cross claims into a third party action against the DelBello firm. As an Answer/Cross claim to the cross claim of Marcott and Leopold had not been demanded in the Answer, the court deemed those claims denied by the DelBello firm pursuant to CPLR 3011.

The joint motion by Marcott, Leopold, and the DelBello firm to change venue was then considered, but having learned that the cross claim by Marcott and Leopold survived the motion to dismiss plaintiff's claims, the DelBello firm additionally brought a motion to dismiss the cross claim. In a decision and order dated February 19, 2004, the court granted the motion to change venue, and the action was transferred to Westchester County. That decision also denied the DelBello firm's motion to dismiss the cross claim, without prejudice, pending transfer of the case to

Westchester County. Plaintiff successfully appealed the decision to change venue to Westchester County. Rochester Drug Co-operative, Inc. v. Marcott Pharmacy North Corp., 2005 WL 273152 (4TH Dept. Feb. 4, 2005). This matter was then remanded. Marcott and Leopold, and the DelBello firm, agreed to submit the motion to dismiss the third party complaint on papers.

DISCUSSION

Third Party Action

The DelBello firm contends that the *sua sponte* conversion of Marcott's and Leopold's cross claim into a third party action is grounds for dismissal. The DelBello firm alleges that, because the requirements of CPLR §§304 and 1007 were not satisfied, the third party action is defective and should be dismissed.

Where the claims made against a party by the plaintiff have been dismissed, a court should convert any remaining cross claims against that party into a third party complaint. See Klinger v. Dudley, 41 N.Y.2d 362, 365 (1977); Fili v. Matson Motors, Inc., 183 A.D.2d 324, 330 (4th Dept. 1992); Jones v. City of New York, 161 A.D.2d 518, 519 (1st Dept. 1990); Cusick v. Lutheran Medical Center, 105 A.D.2d 681, 682 (2nd Dept. 1984); Javitz v. Slatius, 93 A.D.2d 830, 831 (2nd Dept. 1983). Such conversion may occur without the necessity of serving a third party complaint. Jones, 161 A.D.2d at 519. Accordingly, the DelBello firm is not entitled to dismissal of the third party complaint action on the

grounds that the court lacked authority to *sua sponte* convert the cross claim into a third party action.

Failure to State a Cause of Action CPLR §3211(a)(7)

When a motion pursuant to CPLR 3211(a)(7) is made, the complaint must be "given every favorable inference" and the allegations in the complaint are deemed to be true. See Dannasch v. Bifulco, 184 A.D.2d 415, 417 (1st Dept. 1992). See also Henning v. Rando Machine Corp., 207 A.D.2d 106, 110 (4th Dept. 1994) ("On a motion to dismiss for failure to state a cause of action, the allegations in a complaint are deemed to be true and are given the benefit of every possible favorable inference."); Niagara Mohawk Power Corp. v. Ferranti-Packard Transformers, Inc., 201 A.D.2d 902 (4th Dept. 1994); Montrallo v. Fritz, 176 A.D.2d 1215 (4th Dept. 1991). The motion to dismiss will be denied if "from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" 511 West 232nd Owners Corp. v. Jennifer Reality Co., 98 N.Y.2d 144, 152 (2002) (quoting Polonetsky v. Better Homes Depot, 97 N.Y.2d 46, 54 (2001)). When considering such a motion, it is the task of the court to determine whether, "accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated.'" Campaign for Fiscal Equity, Inc. v. State of New York, 86 N.Y.2d 307, 318 (1995) (quoting People v. New York City Transit

Auth., 59 N.Y.2d 343 (1983)). If the court determines "that plaintiffs are entitled to relief on any reasonable view of the facts stated," the court's inquiry is complete, and the complaint is deemed legally sufficient. Campaign for Fiscal Equity 86 N.Y.2d at 318.

Marcott and Leopold's cross claim alleges that, "[i]f for any reason [Marcott and Leopold] are found liable to" plaintiff, then the DelBello firm "should be required to contribute under common law principles of indemnification, under contractual indemnification to the extent applicable, under the grounds that any such liability resulted from acts which were based on advice of said co-defendant [the DelBello firm] operating in their capacity as attorneys for defendant Marcott Pharmacy North Corp. and Robert Leopold." Verified Answer of Marcott and Leopold, ¶11. No other factual or other averments are contained in the verified answer.

Although it is possible that a claim for contribution or indemnification may be properly pled in these circumstances, Schraver v. Joyce, 54 N.Y.2d 1, 5-6 (1981), such a claim must withstand analysis under C.P.L.R. §3211(a)(7). Rosner v. Paley, 65 N.Y.2d 736 (1985). The converted cross claim, quoted above, which is all that is currently before the court, is insufficient to pass muster under §3211(a)(7). "Although the issue 'whether specific conduct constitutes [legal] malpractice normally

requires a factual determination to be made by a jury . . .'
(Grago v. Robertson, 49 A.D.2d 645, 646), the issue whether a pleading sufficiently states a cause of action for legal malpractice poses 'a question of law which . . . [can] be determined on a motion to dismiss . . .'" Prudential Ins. Co. of America v. Dewey Ballantine, Bushby, Palmer & Wood, 170 A.D.2d 108, 115 (1st Dept. 1991) (quoting Rosner v. Paley, 65 N.Y.2d at 738).

The converted "third-party complaint, even if literally construed in favor of the third-party plaintiff . . . , fails to allege a breach of any duty by the third-party defendants giving rise to a cognizable claim to recover damages for legal malpractice." Doone v. Reiser, 272 A.D.2d 368 (2d Dept. 2000). Cf., Keeby v. Tracy, 301 A.D.2d 502 (2d Dept. 2003) ("no factual basis upon which" the claimant "could predicate their claims for contribution and indemnification against the . . . [law firm]"). Although any argument that the law firm was "acting as agents for a disclosed principal, and not as [c]ounsel for [third-party] plaintiff," is insufficient to carry a C.P.L.R. §3211(a)(7) motion, Patterson, Belkrap, Webb & Tyler, LLP v. Bond Sgreet Associates, LTD., 266 A.D.2d 125 (1st Dept. 1999), "conclusory allegations of negligence on the part of the third-party defendant" law firm are "[in]sufficient to state a cause of action for contribution and/or indemnification." Mayer v.

Sanders, 264 A.D.2d 827, 828 (2d Dept. 1999). Mere participation by the attorneys "in certain of the matters asserted in . . . [the pleadings] . . . fails to set forth any meritorious cause of action against them" for "contribution on a legal malpractice theory." Coldwell Banker Real Estate Services, Inc. v. Eustice, 145 A.D.2d 460, 461 (2d Dept. 1988).

Discovery

The DelBello firm alleges that Marcott and Leopold were served with a First Set of Written Interrogatories on September 9, 2003, and that Marcott and Leopold have not answered or objected to this discovery device. CPLR §3133(a) provides that responses to such interrogatories are due within 20 days of service of the same. Marcott and Leopold allege that this discovery demand was premature because it was not "preceded by the appropriate responsive pleading" to their cross claim. Affidavit of Robert Hersh, ¶6.

There was no need for the DelBello firm to file a responsive pleading to the cross claim in this matter. CPLR §3011 provides that an answer to a cross claim is required only where a demand for an answer is made. "If no demand is made, the cross claim shall be deemed denied or avoided." CPLR §3011. Moreover, Marcott and Leopold's assertion that this motion to dismiss is premature because discovery has not been had by them is without basis.

CONCLUSION

The DelBello firm is not entitled to dismissal of the third party action on the basis of the prior court's *sua sponte* conversion of the cross claim into a third party action. But the DelBello firm's motion to dismiss the cross claim to the extent that cross claim alleges a cause of action for contribution is granted. To the extent the cross claim alleges contractual indemnification, the DelBello firm's motion to dismiss is granted, as Marcott and Leopold have not alleged the existence of a contract containing any indemnification language. The DelBello firm's motion to dismiss is granted to the extent Marcott and Leopold seek recovery on a theory of common law (or implied) indemnification. The DelBello firm's motion for attorneys' fees and costs is denied.

- (1) Complete discovery by August 15, 2005,
- (2) File note of issue by September 1, 2005,
- (3) Conference to set a day certain for trial:
September 13, 2005, at 9:15am.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: March 22, 2005
Rochester, New York