

Sweeny, J.P., Richter, Manzanet-Daniels, Gische, JJ.

492 Little Rest Twelve, Inc., Index 650209/10
 Plaintiff,

-against-

Nina Zajic, et al.,
Defendants.

- - - -

Nina Zajic, et al.,
Third Party-Plaintiffs-Appellants,

-against-

Martin Russo, et al.,
Third Party-Defendants-Respondents.

Sternik & Zeltser, New York (Emanuel Zeltser of counsel), for appellants.

Gusrae Kaplan Nusbaum PLLC, New York (Martin P. Russo of counsel), for respondents.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered December 11, 2014, which, to the extent appealed from, granted third-party defendants' motion to dismiss the third-party complaint with prejudice, and declined to disqualify third-party defendants as plaintiff's counsel, unanimously modified, on the law, to make the dismissal without prejudice, and otherwise affirmed, without costs.

As discussed below, the motion to dismiss the third-party complaint was correctly granted. However, since it is based on a

failure to state a cause of action, the dismissal should be without prejudice to apply upon a proper showing for leave to plead again (*Morpheus Capital Advisors LLC v USB AG*, 105 AD3d 145, 154 [1st Dept 2013], *revd on other grounds* 23 NY3d 528 [2014]).

Third-party plaintiffs fail to allege a duty owed them by third-party defendants that would support a claim for contribution or indemnification (see *Raquet v Braun*, 90 NY2d 177, 183 [1997]; *Garrett v Holiday Inns*, 86 AD2d 469, 471 [4th Dept 1982], *mod on other grounds* 58 NY2d 253 [1983]).

In support of the claim alleging a violation of Judiciary Law § 487, the third-party complaint contains no nonconclusory allegations that the alleged misconduct was "merely a means to the accomplishment of a larger fraudulent scheme" (*Newin Corp. v Hartford Acc. & Indem. Co.*, 37 NY2d 211, 217 [1975]) "greater in scope than the issues determined in the prior proceeding" (*Specialized Indus. Servs. Corp. v Carter*, 68 AD3d 750, 752 [2d Dept 2009] [internal quotation marks omitted]). Thus, the claim is not properly asserted in this action but would be appropriately raised in the still pending underlying action, where the alleged misconduct occurred (see *Seldon v Spinnell*, 95 AD3d 779 [1st Dept 2012], *lv denied* 20 NY3d 857 [2013]; *Melnitzky*

v Owen, 19 AD3d 201 [1st Dept 2005]).

In support of the fraud claim, the third-party complaint fails to allege specific facts demonstrating which statements or filings were knowingly and materially false, and fails to identify misrepresentations actually made by third-party defendants (see *Barbarito v Zahavi*, 107 AD3d 416, 419 [1st Dept 2013]). Nor does it allege justifiable reliance (see *Lemle v Lemle*, 92 AD3d 494, 499 [1st Dept 2012]). The claim of aiding and abetting fraud fails to allege an underlying fraud (see *Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009], lv denied 13 NY3d 709 [2009]).

Since the third-party complaint does not allege that third-party defendants, as plaintiff's attorneys, acted outside the scope of their authority as plaintiff's agents, it fails to state a cause of action for tortious interference with contract (see *Burger v Brookhaven Med. Arts Bldg.*, 131 AD2d 622, 623-624 [2d Dept 1987]; *Kartiganer Assoc. v Town of New Windsor*, 108 AD2d 898, 899 [2d Dept 1985], appeal dismissed 65 NY2d 925 [1985]). The third-party complaint also fails to identify the particular provision of the contract allegedly breached (see *Williams v Citigroup, Inc.*, 104 AD3d 521 [1st Dept 2013]).

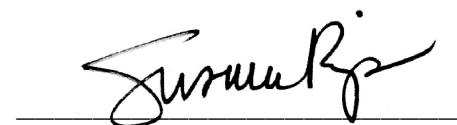
In support of the assault and battery claims, third-party plaintiffs fail to allege that they themselves were either assaulted or battered by third-party defendants.

Under the circumstances of this case, and in view of its conclusion that the third-party complaint is "patently defective," the court properly declined to disqualify third-party defendants as plaintiff's counsel.

We have considered third-party plaintiffs' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016



Susan R.
CLERK