STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION No. 22-CV-406
BENDETT AND McHUGH, P.C., Plaintiff, v. MELISSA HAYDEN, Defendant.	

RULING ON DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiff Bendett and McHugh, P.C. is a Connecticut law firm, which represents mortgage holders seeking to foreclose on mortgages in Vermont and elsewhere. This suit arises out of a foreclosure action that the law firm filed in this Court in 2015 on behalf of Bank of America, N.A.[1] In this suit the law firm seeks to recover $59,852.63 in losses that Bank of America N.A. allegedly incurred in the foreclosure action because of the failure of the Defendant, Melissa Hayden, to appear at the public auction of the property and make a bid on the Bank's behalf. In its Complaint, the law firm alleges that Hayden is liable to it for the loss under theories of negligence (Count I) and/or breach of contract (Count II).

Presently before the Court is Hayden's motion for judgment on the pleadings. Hayden contends that she is entitled to judgment in her favor as a matter of law because the alleged loss was caused by an intervening efficient cause (i.e., the auctioneer's decision to proceed with the auction without her), the auctioneer's action was unforeseeable, the alleged loss was not reasonably within the contemplation of the parties at the time they entered into their contract in this case, and the law firm's negligence claim is barred by the economic loss rule. The law firm opposes the motion.

Judgment on the pleadings pursuant to V.R.C.P. 12(c) is appropriate when "the movant is entitled to judgment as a matter of law on the basis of the pleadings." Messier v. Bushman, 2018 VT 93, ¶9, 208 VT 261 (quotation omitted). When reviewing a motion for judgment on the pleadings, the court assumes "all well pleaded factual allegations in the nonmovant's pleadings and all reasonable inferences that can be drawn therefrom" are true and "all contravening assertions in the movant's pleadings" are false. Thayer v. Herdt, 155 Vt. 448, 456 (1990) (quotation omitted). The motion may be granted only "if the plaintiff's pleadings contain no allegations that if proven would permit recovery." Hinsdale v. Sherman, 171 Vt. 605, 606 (2000) (mem.).

The law firm's Complaint alleges the following facts, which the Court assumes to be

[1] The foreclosure action was entitled Bank of America, N.A. v. Seamus P. O'Kelly, et al. Docket No. 314-5-15 Wncv.

true: On or about September 21, 2015, Hayden and the law firm entered into an agreement entitled "Third Party Vendor Agreement" (Complaint, ¶3). The agreement remained in effect until July 23, 2019, when Hayden tendered her resignation (Id.).

Pursuant to the agreement, Hayden agreed to perform auction bidding services as requested by the law firm, and she further agreed to notify the law firm immediately if she was unable to perform a requested bidding service (Id., ¶¶ 4, 10). By signing the agreement, Hayden represented to the law firm that she had "the requisite experience, knowledge and expertise, licensing and authority needed" to perform the auction bidding services as set forth in the agreement (Id., ¶10). In addition, Hayden agreed to "indemnify and hold harmless the [law firm] … from any liability, claims, actions losses, expenses or costs of any kind … as a consequence or arising out of [her] performance of the services for which [she] has been retained" (Id.).

The law firm contracted Hayden to attend an in-person judicial foreclosure auction to be held at 10:00 a.m. on December 8, 2016, at 565 Muzzy Road in Berlin, Vermont, and to submit a bid at the auction on behalf of its client, Bank of America, N.A., in the amount of $120,000 (Id., ¶¶ 5, 9). Hayden failed to appear at the auction, however, and she did not contact the law firm to inform it that she was unable to appear (Id., ¶6). The auctioneer proceeded with the sale anyway, however, and although he was not legally authorized to do so, the auctioneer attempted to enter a bid of $120,000 on behalf of Bank America, N.A. (Id., ¶¶ 7, 8). Following extensive litigation, the Court awarded the property to a third party who had appeared at the auction and bid $40,000 for the property (Id., ¶8).

As a result of Hayden's failure to appear at the action, the law firm's client, Bank of America, N.A. was unable to place a bid at the auction in order to protect its interests (Id., ¶12). Because of this, Bank of America, N.A. realized a loss in the amount of $59,852.63 (Id., ¶¶ 12, 13). The law firm "was then liable to its client for the client's loss in connection with this property" (Id., ¶13). The law firm now seeks a judgment against Hayden, requiring her "to pay Plaintiff the amount of $59,852.63 plus interest…." together with an award of "its costs, attorney's fees, and expenses … in bringing this action" and "such other relief as is equitable and just" (Complaint, p. 3).

The law firm contends that its Complaint adequately asserts a viable breach of contract claim against Hayden because her failure to appear at the auction or to inform the law firm of her inability to appear clearly breached her promise to perform auction bidding services at the law firm's request, and because her breach directly caused the $59,852.63 loss at issue here. The law firm further argues that such a loss was foreseeable and within the contemplation of the parties at the time they entered into their agreement. In addition, the law firm contends that the auctioneer had no authority to postpone the auction on account of Hayden's failure to appear, so his proceeding with the auction cannot be viewed as an intervening efficient cause of the loss. Lastly, the law firm contends that its negligence claim is not barred by the economic loss rule because the "Third Party Vendor Agreement" created a special relationship between the parties.

The Court does not need to address the specific contentions raise by the parties because there is a fundamental flaw with the law firm's claims in this case. Even assuming that Hayden's actions constituted actionable negligence and a breach of her contract with

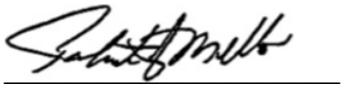
the law firm, the law firm cannot show that her negligence or breach caused *it* any damage or loss. An essential element of any negligence claim is that the negligence must proximately cause the *plaintiff* to suffer some harm or loss. Sutton v. Vermont Regional Center, 2019 VT 71A, ¶26, 212 Vt. 612 ("Common-law negligence has four elements: a legal duty owed by the defendant to the plaintiff, a breach of that duty, injury to the plaintiff, and a causal link between the breach and the injury."). Similarly, a plaintiff's failure to prove that it sustained damages is fatal to a breach of contract claim. Dufresne-Henry Engineering Corp. v. Gilcris Enterprises, Inc., 136 Vt. 274, 277 (1978) ("Appellant offered no evidence of the extent of its damages other than that which the trial court correctly ruled inadmissible. Failure to prove damages is fatal to appellant's cause of action.").

The only loss or damage alleged in this case was the $59,852.63 loss that Bank of America, N.A. allegedly sustained on account of Hayden's failure to appear at the auction. The law firm itself is not alleged to have sustained any damage or loss whatsoever, on account of Hayden's alleged negligence and breach of contract. Moreover, although Bank of America, N.A. was the law firm's client in the underlying foreclosure action, the Bank is not a party to this suit against Hayden; the law firm has brought this suit in its own name and on its own behalf, not on behalf of the Bank. Because the law firm has not alleged that it sustained any damage or loss on account of Hayden's actions, it cannot maintain a negligence or breach of contract action against her as a matter of law.

This suit is really an action for indemnity disguising as a negligence or breach of contract suit. According to the Complaint, the law firm's client, Bank of America, N.A., realized a loss of $59,852.63 when Hayden failed to appear at the auction, and the law firm "was then liable to its client for the client's loss in connection with this property" (Id., ¶13). The law firm now seeks to recover that $59,852.63 loss from Hayden, not because Hayden's actions caused the law firm to sustain the loss, but because the law firm was allegedly liable to its client for the client's loss. That is a classic indemnity claim. Such claims can be based upon either an express or implied indemnification agreement, but, either way, the claim is separate and distinct from a negligence and breach of contract claim, and indemnity claims come with their own separate set of defenses. *See, for example,* Quality Market v. Champlain Valley Fruit, 127 Vt. 562, 566 (1969) ("To protect the indemnitor's right to defend against liability, a voluntary payment by an indemnitee, without notice to the person sought to be charged, may foreclose restitution." (citation omitted)).

Assuming the allegations of the Complaint are all true, the Plaintiff law firm cannot sustain a claim against the Defendant for either negligence or breach of contract. Therefore, the Defendant is entitled to judgment on the pleadings in her favor on those claims. Because the agreement between the parties contains an express indemnification provision, however, the Plaintiff law firm may have a viable indemnity claim against the Defendant. Therefore, Plaintiff is entitled to a reasonable opportunity to amend its Complaint to assert an indemnity claims against the Defendant, if it be so advised. Plaintiff has twenty-one (21) days from the date of the entry of this decision within which to file and serve a motion to amend its Complaint and proposed amended complaint. Otherwise, final judgment will be entered in favor of the Defendant.

SO ORDERED this 26th day of October, 2022.



Robert A. Mello
Superior Judge