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CIVIL DIVISION

Case No. 22-CV-04293

Joseph Verdone, et al v. Kingsbury Civil Contracting, LLC, et al

Order on Motion to Amend

Plaintiffs (the “Verdones”) have filed a motion to amend the Complaint to assert a claim for indemnity against Defendant Kingsbury Civil Contracting (“Kingsbury”). Kingsbury has opposed the motion on futility grounds asserting that leave to amend should be denied because the amended complaint would fail to state a claim against it. The Court makes the following determinations.

Vt. R. Civ. P. 15(a) provides that leave to amend a complaint shall be freely given by the court “when justice so requires.” In Vermont, this provision has been liberally construed in favor of allowing parties to amend their pleadings. *Lillicrap v. Martin*, 156 Vt. 165 (1991). Leave to amend is not always granted, however. It may be denied when the just and expeditious disposition of the dispute between the parties will not be advanced via the amendment. In making that determination, the Court analyzes whether the proposed amendment: (1) would result in undue delay; (2) is brought in bad faith; (3) would result in unfair prejudice to the opposing party; or (4) would be “futile” in that it would fail to state a claim upon which relief can be granted. *Perkins v. Windsor Hosp. Corp.*, 142 Vt. 305, 313 (1982).

Futility is judged by the same standard as would govern a motion to dismiss. *See Prive v. Vt. Asbestos Grp.*, 2010 VT 2, ¶ 13, 187 Vt. 280; *IBEW Local Union No. 58 Pension Trust Fund and Annuity Fund v. Royal Bank of Scotland Group, PLC*, 783 F.3d 383, 389 (2d Cir. 2015). Under Vermont law, motions to dismiss face a high bar: “Dismissal under Rule 12(b)(6) is proper only when it is beyond doubt that there exist no facts or circumstances consistent with the complaint that would entitle Plaintiff to relief.” *Bock v. Gold*, 2008 VT 81, ¶ 4, 184 Vt. 575, 576 (mem.) (quoting *Union Mut. Fire Ins. Co. v. Joerg*, 2003 VT 27, ¶ 4, 175 Vt. 196, 198)). In considering a motion to dismiss, the Court “assume[s] that all factual allegations pleaded in the complaint are true, accept[s] as true all reasonable inferences that may be derived from plaintiff’s pleadings, and assume[s] that all contravening assertions in defendant’s pleadings are false.” *Mahoney v. Tara, LLC*, 2011 VT 3, ¶ 7, 189 Vt. 557, 559 (mem.) (internal quotation, brackets, and ellipses omitted).

A complaint must still meet a minimum standard of pleading, however. Vt. R. Civ. P. 8 requires that a complaint’s allegations show “the pleader is entitled to relief,” and it must provide “fair notice” to defendant of the claim against him, Vt. R. Civ. P. 8, Reporter’s Notes.

Here, the salient allegations of the pleadings and proposed pleadings concern an alleged incident of tree cutting near or across the boundary of the lands owned by the Verdones and the Reid Defendants (the “Reids”). Kingsbury was hired by the Reids to do the cutting. The Verdones allege various damages due to cutting that allegedly took place on their land without their permission. They sued the Reids

and Kingsbury. The Reids filed a counterclaim asserting, *inter alia*, that they had settled the dispute with the Verdones and performed remedial work as agreed. The Verdones dispute that they agreed to settle the case. To the extent that is not true, they allege in the proposed amended complaint that any purported settlement agreement was based on false information provided to them by Kingsbury. Their claim for indemnity posits that, if they are liable to the Reids for breach of the settlement agreement, Kingsbury should indemnify them because their agreement was induced by his false information.

Indemnification can arise through an express agreement or through circumstances where indemnification is implied by law. *White v. Quechee Lakes Landowners' Ass'n, Inc.*, 170 Vt. 25, 28-29 (1999). The Verdones make no claim for express indemnification but maintain that the above circumstances warrant implied indemnification under equitable principles. The Court disagrees.

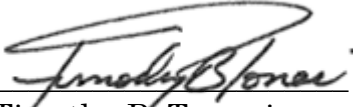
While it is true that indemnification has an equitable component, *see City of Burlington v. Arthur J. Gallagher & Co.*, 173 Vt. 484, 486–87 (2001), that does not mean it is boundless. The case law provides some guiding principles that serve to cabin the scope of implied indemnity. For indemnity to exist, there must be some legal relationship between the indemnitor and the indemnitee that warrants indemnity, and/or both parties are joint tortfeasors liable to the same alleged victim due to the same conduct, and/or one party must be primarily liable and the other is secondarily (and without fault) liable to an alleged victim. The cases cited by the Verdones in their Reply Memorandum are consistent with those principles. *See also*

Restatement (Second) of Torts § 886B (“If two persons are liable in tort to a third person for the same harm and one of them discharges the liability of both, he is entitled to indemnity from the other if the other would be unjustly enriched at his expense by the discharge of the liability.”); *Restatement (Third) of Torts:*

Apportionment Liab. § 22 (“When two or more persons are or may be liable for the same harm and one of them discharges the liability of another in whole or in part by settlement or discharge of judgment, the person discharging the liability is entitled to recover indemnity in the amount paid to the plaintiff....”).

Here, none of those hallmarks of implied indemnity arise from the allegations of the proposed amendment or any reasonable inferences drawn therefrom. The Verdones and Kingsbury are not jointly liable to the Reids for the same conduct, they are not joint tortfeasors vis-à-vis the Reids, and they do not stand primarily and secondarily liable to the Reids via the alleged settlement agreement. The allegations of the pleadings and proposed pleadings of the parties suggest that Kingsbury gave the Verdones false information, they made a contract based on it, and breached that contract. While the Verdones may have some type of claim against Kingsbury arising out of that scenario, a matter on which the Court does not express an opinion, it does not sound in an action for indemnification.

Electronically signed on Thursday, March 16, 2023, pursuant to V.R.E.F. 9(d).


Timothy B. Tomasi
Superior Court Judge