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Supreme Court, Kings County, New York.
In the Matter of the Petition to appoint a wind-up person for LOWBET REALTY CORP., pursuant to Business CorporationLaw § 1108, or to dissolve Lowbet Realty Corp.pursuant to Business CorporationLaw § 1104–a or 1104 and appoint a wind-up person, and for ancillary relief including appointment for a receiver for the sale of the property owned by Lowbet Realty Corp.Shau Chung Hu, Individually and derivatively on behalf of Lowbet Realty Corp., Petitioner,
Lowbet Realty Corp., Margaret Liu, and All Persons Interested in Lowbet Realty Corp., 973 44th Street Realty LLC, Bay Shine Management Company and Ray Chen, Respondents.

Feb. 18, 2014.

Background: In proceeding to wind up the affairs of corporation that owned a residential apartment building, corporation's majority shareholder asserted claims against purported purchaser of the apartment building seeking rescission of the sale of the property, and an accounting. Purported purchaser asserted cross-claims against building's managing agents for indemnification and contribution. Managing agents moved to dismiss the cross-claims.

Holdings: The Supreme Court, Carolyn E. Demarest, J., held that:
(1) damage purported purchaser would suffer if sale was rescinded qualified as “injury to property” under contribution statute;
(2) dismissal of contribution claim would have been premature at motion to dismiss phase; and
(3) issue of whether purported purchaser's loss of property through rescission warranted indemnification could not be resolved at motion to dismiss phase.

Motion denied.

West Headnotes

[1] Pretrial Procedure 307A 624

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)4 Pleading, Defects In, in General
307Ak623 Clear and Certain Nature of Insufficiency
307Ak624 k. Availability of relief under any state of facts provable. Most Cited Cases

Pretrial Procedure 307A 679

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak679 k. Construction of pleadings. Most Cited Cases

Pretrial Procedure 307A 683

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak682 Evidence
307Ak683 k. Presumptions and burden of proof. Most Cited Cases

In considering a motion to dismiss for failing to state a cause of action, the pleading is to be afforded a liberal construction, and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. McKinney's CPLR 3026, 3211(a)(7).

[2] Contribution 96 5(2)

96 Contribution
96k2 Common Interest or Liability
96k5 Joint Wrongdoers
96k5(2) k. Effect of statute. Most Cited

Cases

As the statutory right to contribution had its genesis in tort law, some form of tort liability is a prerequisite for obtaining contribution. McKinney's CPLR 1401.

[3] Contribution 96 3

96 Contribution
96k2 Common Interest or Liability
96k3 k. In general. Most Cited Cases

The touchstone for determining the right to contribution is the nature of the damages sought, not the nature of the claim alleged in the complaint; even if an action sounds in tort, if the damages sought are in the nature of contract-based economic damages, contribution is not available. McKinney's CPLR 1402.

[4] Contribution 96 5(6.1)

96 Contribution
96k2 Common Interest or Liability
96k5 Joint Wrongdoers
96k5(6) Particular Torts or Wrongdoers
96k5(6.1) k. In general. Most Cited Cases

Damage purported purchaser of residential apartment building would have suffered, in the form of the $1,600,000 paid for the property, if sale of the building was rescinded based upon a fraudulent sale, and the price of the property was not refunded, qualified as "injury to property," supporting purported purchaser's claim for contribution against building's managing agents, as alleged facilitators of the fraudulent sale; while the purported purchaser's loss was predicated upon its contract with the property owner transferring title to the property, its claims against the managing agents were based upon its actual out of pocket loss of property as a result of tortious acts, as the purported purchaser did not seek consequential damages or exclusively economic loss based upon an anticipated benefit of the bargain. McKinney's CPLR 1401
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[5] Pretrial Procedure 307A 535

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)1 In General
307Ak535 k. Dismissal of part of action or as to some of parties. Most Cited Cases

Dismissal of contribution claim brought by purported purchaser of residential apartment building that was sued by majority shareholder of corporation that owned the building for being a knowing, or presumptively knowing, participant in the fraudulent sale of the property, which was allegedly perpetrated with the assistance and complicity of the building's managing agents, against the managing agents, would have been premature at the motion to dismiss phase; although liability of purported purchaser and managing agents was premised on different theories, it was plausible that their actions and/or omissions, together, may have contributed to majority shareholder's single injury, and even though relief sought by majority shareholder with respect to purported purchaser was the equitable remedy of rescission, no determination had yet been made regarding the practicality or possibility of granting rescission, and purported purchaser also could have been subject to tort-based liability for fraud. McKinney's CPLR 1401.

[6] Corporations and Business Organizations 101 3081

101 Corporations and Business Organizations
101XII Dissolution and Forfeiture of Franchise
101XII(C) Operation and Effect of Dissolution or Forfeiture in General
101k3081 k. Conveyances and preferences after proceedings for dissolution. Most Cited Cases

The Business Corporation Law empowers a court to exercise its inherent equitable power, in the context of a proceeding for judicial dissolution, to set aside an unauthorized transfer of a corporate asset; although not tort-based, per se, the court is authorized to determine the extent to which such

transfer shall be void, suggesting a standard analogous to that for a fraudulent conveyance.

[7] Cancellation of Instruments 69 ⚿58

69 Cancellation of Instruments
69II Proceedings and Relief
69k54 Relief Awarded
69k58 k. Recovery of consideration or of damages. Most Cited Cases

Even where the only remedy requested is rescission, when a court finds that the remedy of rescission is impossible or impracticable, money damages may be awarded instead of the equitable remedy of rescission.

[8] Indemnity 208 ⚿53

208 Indemnity
208III Indemnification by Operation of Law
208k53 k. Common law indemnification. Most Cited Cases

Implied or common-law indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other; thus, a person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other is entitled to indemnity.

[9] Indemnity 208 ⚿53

208 Indemnity
208III Indemnification by Operation of Law
208k53 k. Common law indemnification. Most Cited Cases

Common-law indemnification is generally available in favor of one who is held responsible solely by operation of law because of his or her relation to the actual wrongdoer.

[10] Indemnity 208 ⚿61

208 Indemnity
208III Indemnification by Operation of Law
208k56 Right of One Compelled to Pay Against Person Primarily Liable
208k61 k. Secondary liability. Most Cited Cases

A classic form of a common-law indemnification claim exists in favor of a party who is held vicariously liable for the tort of another.

[11] Indemnity 208 ⚿59

208 Indemnity
208III Indemnification by Operation of Law
208k56 Right of One Compelled to Pay Against Person Primarily Liable
208k59 k. Relative culpability. Most Cited Cases

Indemnity 208 ⚿61

208 Indemnity
208III Indemnification by Operation of Law
208k56 Right of One Compelled to Pay Against Person Primarily Liable
208k61 k. Secondary liability. Most Cited Cases

Although the doctrine of implied indemnification is not strictly limited to recovery by parties found to be vicariously liable, a party may not obtain indemnification for its own wrong.

[12] Indemnity 208 ⚿50

208 Indemnity
208III Indemnification by Operation of Law
208k50 k. In general. Most Cited Cases

In determining the right of a party to implied indemnification, the key element is not a duty running from the indemnitor to the injured party, but rather is a separate duty owed the indemnitee by the indemnitor.

[13] Pretrial Procedure 307A ⚿680

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak680 k. Fact questions. Most

Cited Cases

Issue of whether purported apartment building purchaser's loss of the property to majority shareholder of corporation that had owned the building through rescission warranted indemnification could not be resolved at the motion to dismiss phase because question of whether the collaborative actions of corporation's minority shareholder and the building's managing agents effectively defrauded the purported purchaser could not be determined as a matter of law on the pleadings.

***287** Kenneth M. Moltner, Bressler, Amery & Ross, P.C., New York, for Plaintiff.

Neil Torczyner, Friedman, Harfenist, Kraut & Perlstein, Lake Success, for Defendants Bay Shine Management and Ray Chen.

David K. **Fiveson**, Butler, Fitzgerald, Fiveson & McCarthy, New York, for Defendant 973 44th Street Realty LLC.

CAROLYN E. DEMAREST, J.

Respondents Bay Shine Management Company (Bay Shine) and Ray Chen (Chen) move for an order, pursuant to CPLR 3211(a)(7), dismissing the cross-claims of respondent 973 44th Street Realty LLC (973 44th Street) as against Bay Shine and Chen.

973 44th Street cross-claims against Bay Shine and Chen for indemnification/contribution arise in this special proceeding commenced by petitioner Shau Chung Hu to wind-up the affairs of respondent Lowbet Realty Corp. (Lowbet) and to determine if the assets of Lowbet had been dissipated by respondent Margaret Liu, and if they had, the extent of the dissipation. [FN1] Lowbet is a corporation that petitioner purchased in January 1980 whose sole asset was a residential apartment building with 19 rental units (referred to as the property or the premises hereafter). In 1985, petitioner married Liu and Liu thereafter obtained a 25 percent interest in Lowbet, with petitioner retaining the remaining 75 percent interest. Upon the commencement of this special proceeding, the court granted a temporary restraining order that required, among other things, that Bay Shine, which was the management company for the property owned by Lowbet, continue to act as the management company. The temporary restraining order also barred petitioner and Liu from participating in the management of the realty and barred them from removing assets of Lowbet without further court ***288** order. It is not clear whether the temporary restraining order was served upon Bay Shine by petitioner.

> FN1. The court notes that the facts are more fully detailed in this court's decision and order, dated November 2, 2012, that granted petitioner's motion for leave to amend the petition (*Matter of Shau Chung Hu v. Lowbet Realty Corp.*, 38 Misc.3d 589, 956 N.Y.S.2d 400 [Sup. Court, Kings County 2012]).

As alleged in the amended petition, despite the temporary restraining order, by way of a February 16, 2012 document signed by Liu and signed on behalf of Bay Shine by Chen, Bay Shine resigned as managing agent of Lowbet and provided Liu with corporate items, including Lowbet's checkbook and keys. Petitioner alleges that these acts were done without notifying petitioner. Thereafter, Liu, by way of a deed dated February 22, 2012, sold the property to 973 44th Street for $1,600,000 without petitioner's knowledge or consent and without court approval. [FN2] Petitioner alleges three causes of action against 973 44th Street: (1) seeking rescission of the sale of the property pursuant to Business Corporation Law § 1114; [FN3] (2) seeking an accounting, pursuant to Business Corporation Law § 1114, of 973 44th Street's rents, income and profits since its purchase of the property; and (3) seeking rescission of the sale of the property as a fraudulent conveyance on the ground that 973 44th Street knew or should have known that petitioner had an interest in the property and that Liu was not authorized to conduct the transaction. With respect to Bay

Shine and Chen, petitioner alleges a cause of action premised on breach of fiduciary duty, aiding or abetting a breach of fiduciary duty and/or negligence, based on Bay Shine's resigning as managing agent and turning over corporate documents and keys to Liu, and by such acts, done without informing petitioner, Bay Shine and Chen facilitated the "fraudulent" sale of the property.

> FN2. 973 44th Street essentially admits that it purchased the premises for $1,600,000.
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> FN3. Business Corporation Law § 1114 provides:
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> > "A sale, mortgage, conveyance or other transfer of, or the creation of a security interest in, any property of a corporation made, without prior approval of the court, after service upon the corporation of a summons in an action, or of an order to show cause in a special proceeding, under this article in payment of or as security for an existing or prior debt or for any other or for no consideration, or a judgment thereafter rendered against the corporation by confession or upon the acceptance of any offer, shall be void as against such persons and to such extent, if any, as the court shall determine."

973 44th Street alleges in its cross-claim against Bay Shine and Chen that, "in the event that the Court rescinds the sale of the Premises to [973 44th Street] ... [973 44th Street] would sustain damages in the minimum amount of $1,600,000 with interest ... costs and counsel fees ... and would be entitled to indemnification and/or contribution from Bay Shine and Ray Chen to the extent that their negligence, breach of contract, violation of this Court's October 5, 2011 order, willful conduct, or their aiding and abetting Liu caused or contributed to" the damages suffered by 973 44th Street. In moving to dismiss 973 44th Street's cross-claim as against Bay Shine and Chen, Bay Shine and Chen assert that 973 44th Street has no legal basis for its indemnification and contribution claims.

[1] In considering a motion to dismiss for failing to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction (CPLR 3026), and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory (*see Hurrell–Harring v. State of New York,* 15 N.Y.3d 8, 20, 904 N.Y.S.2d 296, 930 N.E.2d 217 [2010]; *Leon v. Martinez,* 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1995]). In applying ***289** these principals, 973 44th Street's cross claim for contribution and/or indemnification from Bay Shine and Chen must be considered in conjunction with the petitioner's claims against 973 44th Street alleged in the petition (*Musco v. Conte,* 22 A.D.2d 121, 122, 254 N.Y.S.2d 589 [1964]; *see also Board of Educ. of Hudson City School Dist. v. Sargent, Webster, Crenshaw & Folley,* 71 N.Y.2d 21, 29, 523 N.Y.S.2d 475, 517 N.E.2d 1360 [1987]).

[2][3] The right to contribution is codified in CPLR article 14. CPLR 1401 [FN4] governs who may obtain contribution and under what circumstances it may be obtained, and CPLR 1402 [FN5] addresses how the amount of contribution is to be determined. Under section 1402, a party may not obtain contribution unless it has paid more than its equitable share of the judgment (*Edgewater Apts. v. Flynn,* 268 A.D.2d 227, 228, 701 N.Y.S.2d 357 [1st Dept. 2000]; *Schlimmeyer v. Yurkiw,* 50 A.D.2d 616, 617, 374 N.Y.S.2d 427 [3d Dept. 1975]; CPLR 1402). As the right to contribution had its genesis in tort law, some form of tort liability is a prerequisite for obtaining contribution under CPLR 1401 (*Board of Educ. of Hudson City School Dist.,* 71 N.Y.2d at 27–28, 523 N.Y.S.2d 475, 517 N.E.2d 1360).[FN6] The Court of Appeals has held that CPLR 1401 does not apply where the liability to the plaintiff is based solely on a breach of a contractual obligation (*id.* at 28, 523 N.Y.S.2d 475, 517 N.E.2d

1360). However, the touchstone for determining the right to contribution is the nature of the damages sought, not the nature of the claim alleged in the complaint (*see Children's Corner Learning Ctr. v. A. Miranda Contr. Corp.*, 64 A.D.3d 318, 324, 879 N.Y.S.2d 418 [1st Dept. 2009]; *Trump Vil. Section 3 v. New York State Hous. Fin. Agency*, 307 A.D.2d 891, 897, 764 N.Y.S.2d 17 [1st Dept. 2003], *lv. denied* 1 N.Y.3d 504, 775 N.Y.S.2d 780, 807 N.E.2d 893 [2003]). Even if an action sounds in tort, if the damages sought are in the nature of contract-based economic damages, contribution is not available (*Children's Corner Learning Ctr.*, 64 A.D.3d at 324, 879 N.Y.S.2d 418).

FN4. CPLR 1401 provides that, "Except as provided in sections 15–108 and 18–201 of the general obligations law, sections eleven and twenty-nine of the workers' compensation law, or the workers' compensation law of any other state or the federal government, two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought."

FN5. CPLR 1402 provides that, "The amount of contribution to which a person is entitled shall be the excess paid by him over and above his equitable share of the judgment recovered by the injured party; but no person shall be required to contribute an amount greater than his equitable share. The equitable shares shall be determined in accordance with the relative culpability of each person liable for contribution."

FN6. Of note, the Court of Appeals has also declined to create a common-law right to contribution in contract actions (*Board of Educ. of Hudson City School Dist.*, 71 N.Y.2d at 29, 523 N.Y.S.2d 475, 517 N.E.2d 1360).

[4] Petitioner seeks rescission of the sale to 973 44th Street, pursuant to BCL § 1114, and a declaration that the transfer is void based upon the fraudulent sale, without court approval, during the pendency of this proceeding. Petitioner further alleges that 973 44th Street was a knowing, or presumptively knowing, participant in the fraud perpetrated by defendant Liu, with the assistance and complicity of defendants Bay Shine and Chen, and that all three defendants are, therefore, liable to petitioner for damages under a ***290** tort theory of fraud or aiding and abetting a breach of fiduciary duty by Liu. Thus, unless refunded the price of the property, 973 44th Street will sustain an actual loss by virtue of having paid $1,600,000 for the property, which it seeks to recover from Bay Shine and Chen, either in indemnification or in contribution if Bay Shine and Chen are also determined to be liable to petitioner. While 973 44th Street's loss is predicated upon its contract with Lowbet transferring title to the property, its claims against Bay Shine and Chen are based upon its actual out of pocket loss of property as a result of tortious acts; 973 44th Street does not seek consequential damages or exclusively economic loss based upon an anticipated benefit of the bargain. The damage to 973 44th Street therefore qualifies under CPLR 1401 as "injury to property" (*see Masterwear Corp. v. Bernard*, 3 A.D.3d 305, 307, 771 N.Y.S.2d 72 [1st Dept. 2004]; contrast *Children's Corner Learning Ctr. v. A. Miranda Contr. Corp.*, 64 A.D.3d 318, 323, 879 N.Y.S.2d 418 [1st Dept. 2009]).

[5][6] Petitioner's claims for rescission and an accounting are statutory claims based on Business Corporation Law § 1114, which empowers a court to exercise its inherent equitable power, in the context of a proceeding for judicial dissolution, to set aside an unauthorized transfer of a corporate asset (*Matter of Schramm*, 107 Misc.2d 393, 396–397, 434 N.Y.S.2d 333 [Sup. Ct., New York County 1980]). Although not tort-based, *per se*, the court is

authorized to determine the extent to which such transfer shall be void, suggesting a standard analogous to that for a fraudulent conveyance.

The fraudulent conveyance claim is a tort-based claim in which 973 44th Street's liability would be based on its acting knowingly with respect to Liu's lack of authority, or negligently in failing to ascertain her authority, given that the sale involved Lowbet's sole asset which was subject to the court's order barring such a transaction (*see Bouton v. Thomas Bros. Sales corp.*, 179 A.D.2d 612, 613, 578 N.Y.S.2d 232 [2d Dept. 1992]; *Vig v. Deka Realty Corp.*, 143 A.D.2d 185, 187, 531 N.Y.S.2d 633 [2d Dept. 1988]; *Matter of Shau Chung Hu*, 38 Misc.3d at 598, 956 N.Y.S.2d 400; *see also Masterwear Corp. v. Bernard*, 3 A.D.3d 305, 306–307, 771 N.Y.S.2d 72 [1st Dept. 2004]; *Malul v. Azulay*, 38 Misc.3d 1208[A], 2013 N.Y. Slip Op. 50022, *6, 2013 WL 92866 [Sup. Ct. Queens County 2013]). Petitioner asserts that Bay Shine and Chen are liable to him because Bay Shine's acts in resigning as the managing agent and turning over corporate materials facilitated Liu's fraudulent conveyance of the property. Although underlying petitioner's claim for rescission is the contract between Lowbet and 973 44th Street, and although the liability of 973 44th Street and Bay Shine and Chen to petitioner is premised on different theories, it is "plausible that [their] actions and/or omissions, together, may have contributed to [petitioner's] single injury" (*Comi v. Breslin & Breslin*, 257 A.D.2d 754, 756, 683 N.Y.S.2d 345 [3d Dept. 1999]).

While petitioner seeks money damages against Bay Shine and Chen, relief sought with respect to 973 44th Street is the equitable remedy of rescission (*see Vitale v. Coyne Realty*, 66 A.D.2d 562, 563, 568–569, 414 N.Y.S.2d 388 [4th Dept. 1979]; *Pritz v. Jones*, 117 App.Div. 643, 649–652, 102 N.Y.S. 549 [1st Dept. 1907]). Courts have frequently held that contribution is unavailable to a party against whom the only relief sought was rescission (*see Pinter v. Dahl*, 486 U.S. 622, 661 n. 7, 108 S.Ct. 2063, 100 L.Ed.2d 658 [1988] [Blackman, J., Dissenting]; ***291***Olson v. Thompson*, 273 Minn. 152, 154–155, 140 N.W.2d 321, 322 [1966]; *Marram v. Kobrick Offshore Fund, Ltd.*, 25 Mass.L.Rptr. 443, 2009 WL 1015557, *13 n. 4 [Mass.Super.2009]; *Moslem v. Parietti & McGuire Ins. Agency*, 2011 WL 721653 *5 [S.D.N.Y.2011]; *see generally United States of America v. Staten Island Univ. Hosp.*, 2011 WL 1841795, *5–8 [E.D.N.Y.2011]), primarily because the purpose of the equitable remedy is to return the parties to the status quo ante, which requires that the party from whom the property is taken receive back the consideration paid for the property (*see Vitale*, 66 A.D.2d at 563, 568–569, 414 N.Y.S.2d 388; *Pritz*, 117 App.Div. at 650–651, 102 N.Y.S. 549; *Woodling v. Garrett Corp.*, 813 F.2d 543, 561–562 [2d Cir.1987]).[FN7] In its typical application, the remedy of rescission thus results only in contract-based economic loss (*Children's Corner Learning Ctr.*, 64 A.D.3d at 324, 879 N.Y.S.2d 418).

FN7. Under these principals relating to rescission, there does not appear to be a legal basis for 973 44th Street's assertion, made in its cross-claim, that it will have suffered damages in the amount of $1,600,000 (the purchase price of the premises from Lowbet) if the sale of the premises is rescinded. Here, however, the party to whom payment was made, Liu, has absconded and recovery of the purchase price is problematic unless petitioner provides such funds.

[7] However, in *American Home Assurance Co. v. Nausch, Hogan & Murray, Inc.*, the Appellate Division, First Department recognized that, in some circumstances, the remedy of rescission may have the same effect as subjecting a party to damages for which contribution would be allowed (71 A.D.3d 550, 552–553, 897 N.Y.S.2d 413 [1st Dept. 2010]). Moreover, even where the only remedy requested is rescission, when a court finds that the remedy of rescission is impossible or impracticable,

money damages may be awarded instead of the equitable remedy of rescission (*Ungewitter v. Toch*, 31 A.D.2d 583, 584, 294 N.Y.S.2d 1013 [3d Dept. 1968], *affd.* 26 N.Y.2d 687, 308 N.Y.S.2d 858, 257 N.E.2d 40 [1970]; *see also 423 South Salina St. v. City of Syracuse*, 68 N.Y.2d 474, 483, 510 N.Y.S.2d 507, 503 N.E.2d 63 [1986], *appeal dismissed/cert. denied* 481 U.S. 1008, 107 S.Ct. 1880, 95 L.Ed.2d 488 [1987]; *Vitale*, 66 A.D.2d at 563, 568–569, 414 N.Y.S.2d 388; *see also Lehman v. Revolution Portfolio LLC*, 166 F.3d 389, 394 [1st Cir.1999]).

Applying these principals, while the pleadings alone do not suggest that the remedy of rescission would subject 973 44th Street to actual out of pocket damages as occurred in *American Home Assur. Co.*, this motion is based only on the pleadings. Thus, it is premature to conclude, as a matter of law, that 973 44th Street will have been returned to its previous position prior to a judgment imposing the remedy of rescission. Moreover, depending on what the facts of the transaction reveal, 973 44th Street may also be subject to tort-based liability for fraud, for which it may obtain contribution from co-tortfeasors (*see Masterwear Corp. v. Norman Bernard*, 3 A.D.3d 305, 307, 771 N.Y.S.2d 72 [1st Dept. 2004] ("any tortious act (other than personal injury), resulting in damages constitutes an injury to property' within the meaning of CPLR 1401" and "[t]hat is no reason ... to bar the cross-claim ... since the issue of contribution or indemnification ... must await resolution of plaintiffs' claims."); *see also American Home Assur. Co.*, 71 A.D.3d at 552–553, 897 N.Y.S.2d 413; *see also Lehman*, 166 F.3d at 394 ["as long as damages may be awarded in lieu of rescission, impleader properly may be used to seek contribution towards those potential damages"]). As no determination has yet ***292** been made regarding the practicality or possibility of granting rescission and the impact of such rescission is unclear at this stage, dismissal of 973 44th Street's contribution claim against Bay Shine and Chen would be premature (*see EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170, 832 N.E.2d 26 [2005]; *Lehman*, 166 F.3d at 394).

[8][9][10][11][12] Turning to 973 44th Street's indemnification claim, "[i]mplied [or common-law] indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other" (*Mas v. Two Bridges Assoc.*, 75 N.Y.2d 680, 690, 555 N.Y.S.2d 669, 554 N.E.2d 1257 [1990]; *State of New York v. Stewart's Ice Cream Co.*, 64 N.Y.2d 83, 88, 484 N.Y.S.2d 810, 473 N.E.2d 1184 [1984]). Thus, it is well settled that a "person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other is entitled to indemnity" (*State of New York v. Stewart's Ice Cream Co.*, 64 N.Y.2d at 88, 484 N.Y.S.2d 810, 473 N.E.2d 1184 [internal quotation marks omitted]; *McDermott v. City of New York*, 50 N.Y.2d 211, 216–217, 428 N.Y.S.2d 643, 406 N.E.2d 460 [1980]). Common-law indemnification "is generally available in favor of one who is held responsible solely by operation of law because of his [or her] relation to the actual wrongdoer" (*McCarthy v. Turner Constr., Inc.*, 17 N.Y.3d 369, 375, 929 N.Y.S.2d 556, 953 N.E.2d 794 [2011] [internal quotation marks omitted]; *see also D'Ambrosio v. City of New York*, 55 N.Y.2d 454, 460–461, 450 N.Y.S.2d 149, 435 N.E.2d 366 [1982]). A classic form of a common-law indemnification claim exists in favor of a party who is held vicariously liable for the tort of another (*D'Ambrosio*, 55 N.Y.2d at 462, 450 N.Y.S.2d 149, 435 N.E.2d 366; *Marist Coll. v. Chazen Envtl. Servs., Inc.*, 84 A.D.3d 1181, 1182, 923 N.Y.S.2d 695 [2d Dept. 2011], *lv. dismissed* 17 N.Y.3d 893, 933 N.Y.S.2d 643, 957 N.E.2d 1146 [2011]; *Esteva v. Nash*, 55 A.D.3d 474, 475, 866 N.Y.S.2d 186 [1st Dept. 2008]; *Trustees of Columbia Univ. v. Mitchell/Giurgola Assoc.*, 109 A.D.2d 449, 453–454, 492 N.Y.S.2d 371 [1st Dept. 1985]). Although the doctrine of implied indemnification is not strictly limited to recovery by parties found to be vicariously liable (*see State of New York v. Stew-*

art's Ice Cream Co., 64 N.Y.2d at 88, 484 N.Y.S.2d 810, 473 N.E.2d 1184 [State could recover costs of environmental cleanup from party responsible for contamination]; *Murray Bresky Consultants, Ltd. v. New York Compensation Manager's Inc.*, 106 A.D.3d 1255, 1259–1260, 968 N.Y.S.2d 595 [3d Dept. 2013]; *City of New York v. Lead Indus. Assn.*, 222 A.D.2d 119, 129–130, 644 N.Y.S.2d 919 [1st Dept. 1996]), a party may not obtain indemnification for its own wrong (*Rosado v. Proctor & Schwartz*, 66 N.Y.2d 21, 25–27, 494 N.Y.S.2d 851, 484 N.E.2d 1354 [1985]; *Marist Coll.*, 84 A.D.3d at 1182, 923 N.Y.S.2d 695). In determining the right of a party to implied indemnification, the "key element ... is not a duty running from the indemnitor to the injured party, but rather is a separate duty owed the indemnitee by the indemnitor" (*Raquet v. Braun*, 90 N.Y.2d 177, 183, 659 N.Y.S.2d 237, 681 N.E.2d 404 [1997] [internal quotation marks omitted]; *see also Rosado*, at 24, 494 N.Y.S.2d 851, 484 N.E.2d 1354).

[13] If 973 44th Street is found liable to petitioner for rescission based on fraud, it would not be able to obtain indemnification, since its loss would result from its own culpability in the transfer of title in violation of petitioner's rights. Under such circumstances, 973 44th Street's liability would not be only vicarious (*see* ***293***Marist Coll.*, 84 A.D.3d at 1183, 923 N.Y.S.2d 695; *Esteva*, 55 A.D.3d at 475, 866 N.Y.S.2d 186; *Trustees of Columbia Univ.*, 109 A.D.2d at 453–454, 492 N.Y.S.2d 371), and 973 44th Street would not be entitled to indemnification.

On the other hand, the statutory claims for rescission and an accounting pursuant to Business Corporation Law § 1114 may, in effect, impose vicarious liability on 973 44th Street for the actions of its co-defendants in fraudulently conveying petitioner's property because section 1114 does not require the court to find the recipient of the corporate property at fault before setting aside a sale. In defending the action, 973 44th Street argues that it acted without fault in purchasing the property and that the acts of petitioner, Bay Shine and Chen cloaked Liu with apparent authority to act on Lowbet's behalf. Whether the collaborative actions of Liu and Bay Shine and Chen effectively defrauded 973 44th Street such that 973 44th Street's loss of its property to petitioner through rescission warrants indemnification cannot be determined as a matter of law on the pleadings. Whether or not 973 44th Street can demonstrate that it reasonably believed that Liu had such authority, [FN8] a party's ultimate ability to establish its allegations is not part of the calculus in determining a motion to dismiss (*see EBC I, Inc.*, 5 N.Y.3d at 19, 799 N.Y.S.2d 170, 832 N.E.2d 26). Finally, as discussed above with respect to 973 44th Street's contribution claim, 973 44th Street may be able to demonstrate that it has suffered damages or a loss as the result of a rescission of the sale through no fault of its own and thus be eligible to recover on a theory of indemnification from those who caused its loss (*American Home Assur. Co.*, 71 A.D.3d at 551–553, 897 N.Y.S.2d 413; *Masterwear Corp.*, 3 A.D.3d at 305, 771 N.Y.S.2d 72).

FN8. Of note, in this regard, the sale took place after the commencement of this special proceeding and the issuance of this court's order barring the transfer of Lowbet's assets, and the sale, which apparently involved substantially all of Lowbet's assets, required approval of two thirds of the shareholders (*see Bouton*, 179 A.D.2d at 613, 578 N.Y.S.2d 232; *Vig*, 143 A.D.2d at 187, 531 N.Y.S.2d 633; *Matter of Shau Chung Hu*, 38 Misc.3d at 598, 956 N.Y.S.2d 400; Business Corporation Law § 909[b]). 973 44th Street's due diligence in contracting to purchase solely upon the signature of Liu is therefore an issue of fact to be addressed at a later point.

CONCLUSION

Accordingly, Bay Shine and Chen's motion to dismiss 973 44th Street's cross-claims is denied.

This constitutes the decision and order of the court.

N.Y.Sup.,2014.
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