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Joseph Norita Camacho

IN THE SUPERIOR COURT FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

FOSHAN TIANNING
INTERNATIONAL TRAVEL, LTD

Plaintiff,

vs.

STAR MARIANAS AIR, INC.,

Defendant.

CIVIL ACTION NO. 18-0312

ORDER DISMISSING COMPLAINT FOR
(1) FAILURE TO STATE A BASIS FOR
VICARIOUS LIABILITY AND (2) FAILURE
TO ALLEGE THAT PLAINTIFF FOSHAN
EXTINGUISHED DEFENDANT STAR
MARIANAS' LIABILITY TO A THIRD-
PARTY

I. INTRODUCTION

THIS MATTER came before the Superior Court for the Commonwealth of the Northern Mariana Islands ("Commonwealth Superior Court") on May 14, 2019, for failure to state a claim under Rule 12(b)(6) of the Commonwealth Rules of Civil Procedure. Bruce Berline appeared on behalf of Plaintiff Foshan Tianning International Travel, LTD ("Foshan" or "Plaintiff"). Timothy Bellas appeared on behalf of Defendant Star Marianas Air, Inc. ("Star Marianas" or "Defendant").

On March 05, 2019, Defendant Star Marianas filed its Motion to Dismiss Pursuant to Com. R. Civ. P. 12(B)(6) And Memorandum of Law ("Defendant's Motion"). In Defendant's Motion, Defendant argued that Plaintiff Foshan failed to state a claim for relief for common law indemnity because: (1) the complaint failed to set forth the basis for vicarious liability between Plaintiff Foshan and Defendant Star Marianas; and (2) the complaint failed to allege that Plaintiff Foshan extinguished Defendant Star Marianas' liability to third-parties.

By order of the Court, Associate Judge Joseph N. Camacho

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1 On April 05 2019, Plaintiff filed its Opposition to Defendant’s Motion to Dismiss Pursuant to
2 Com. R. Civ. P. 12(b)(6). On May 07, 2019, Defendant filed its Reply in Support of Defendant’s
3 Motion to Dismiss Pursuant to Com. R. Civ. P. 12(b)(6).

4 For reason’s stated below, Defendant Star Marianas’ motion to dismiss is hereby **GRANTED**.

5 II. LEGAL STANDARD

6 Rule 8(a)(2) of the Northern Mariana Islands Rules of Civil Procedure states that a pleading
7 “shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to
8 relief.”

9 A court may dismiss a plaintiff’s complaint for “failure to state a claim upon which relief can
10 be granted.” NMI R. Civ. P. 12(b)(6). A Rule 12(b)(6) motion tests the legal sufficiency of the claims
11 asserted in a complaint. *Camacho v. Micronesian Dev. Co.*, 2008 MP 8 ¶ 10. To survive a Rule
12 12(b)(6) motion to dismiss, a “complaint must contain either direct allegations on every material point
13 necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested
14 or intended by the pleader, or contain allegations from which an inference fairly may be drawn that
15 evidence on these material points will be introduced at trial.” *In re Adoption of Magofna*, 1 NMI 449,
16 454 (1990) (citations omitted). “Rule 8(a)(2) does not permit a plaintiff to bring purely speculative
17 claims.” *Atalig v. Mobil Oil Mariana Islands, Inc.*, 2013 MP 11 ¶ 23. This standard ensures that a
18 pleading party pleads enough direct and indirect allegations to provide “fair notice of the nature of
19 the action,” *Syed v. Mobil Oil Mariana Islands, Inc.*, 2012 MP 20 ¶ 19 (citing *In re Adoption of*
20 *Magofna*, 1 NMI at 454), and “protects defendants from having to defend complaints based solely on
21 unsupported legal conclusions since such conclusions do not constitute direct or indirect allegations,”
22 *id.* at ¶ 21.

23 In deciding a motion to dismiss under NMI R. CIV. P. 12(b)(6), the Court must assume that
24 all factual allegations in the challenged pleading are true and construe them in a light most favorable

1 to the non-moving party. *Cepeda v. Hefner*, 3 NMI 121, 127–28 (1992); *Govendo v. Marianas Pub.*
2 *Land Corp.*, 2 NMI 482, 490 (1992). However, the court ““has no duty to strain to find inferences
3 favorable to the plaintiff.”” *Syed*, 2012 MP 20 ¶ 22, (citing *Cepeda*, 3 NMI at 127-28).

4 **III. BACKGROUND**

5 Plaintiff Foshan is a lawful corporation created and existing under the laws of the People’s
6 Republic of China (“China”) with its principle office located in Foshan City, Guangdong Province,
7 China.

8 Defendant Star Marianas is a company located in the Commonwealth of the Northern Mariana
9 Islands (“CNMI”). It is an operator of aircrafts that provides flights between the islands of Tinian and
10 Saipan in the CNMI.

11 On October 6, 2013, a Star Marianas flight took off from Tinian and crashed before reaching
12 Saipan, which kill multiple people and severely injured others (the “Crash”).

13 Four of the passengers involved in the Crash—three survivors and one fatality—made their
14 initial booking through Zheijiang Waihai Star International Travel Co., Ltd. (“Waihai”).

15 Waihai contracted with additional companies in China and in Saipan to provide for the
16 transportation and accommodations sold to customers in China.

17 Waihai contracted with Everbright International Travel Co., Ltd. (“Everbright”) to make
18 travel arrangements for Waihai customers.

19 Everbright in turn contracted with Foshan, with Foshan responsible for arranging flight
20 tickets, local itinerary, accommodations, and other local travel arrangements. As mentioned above,
21 Foshan is a company located in China.

22 Foshan in turn contracted with Saipan Travel to make travel arrangements in Saipan and
23 Tinian. Saipan Travel is a company based in the CNMI.

1 Based on a contract/agreement between Saipan Travel and Star Marianas, Saipan Travel
2 arranged for air transportation for its customers between Tinian and Saipan as part of prearranged
3 tour packages.

4 Lei Wang, one of the injured passengers, filed suit in China on October 21, 2014 against
5 Waihai for compensation for her injuries suffered in the Crash.

6 Foshan was determined to be liable to Waihai for indemnification and made a payment to Lei
7 Wang of 1,065,680.40 yuan as an advance settlement with Lei Wang.

8 Lei Wang prevailed in her lawsuit against Waihai and Waihai was ordered to pay Lei Wang
9 980,463.81 yuan plus a case processing fee of 13,605 yuan.

10 On October 21, 2014, another passenger in the Crash, Peng Liang Cai, filed a lawsuit in China
11 against Waihai to recover damages for serious injuries sustained in the Crash.

12 Peng Liang Cai also prevailed in his lawsuit against Waihai, and Waihai was ordered to pay
13 Peng liang Cai 410,603.30 yuan plus a case processing fee of 7,459 yuan.

14 On October 21, 2014, the three injured passengers in the Crash also filed suit against Waihai
15 for the death of a fourth passenger, Zhang Xiao Lei, who was related to the first three.

16 The three passengers prevailed in this lawsuit, and Waihai was ordered to pay them
17 785,616.50 yuan plus a case processing fee of 12,271 yuan.

18 On October 8, 2016, Waihai filed a lawsuit in China against Everbright for indemnification.

19 Waihai prevailed and Everbright was ordered to pay to Waihai 1,067,126.16 yuan
20 representing Waihai's liability to the passengers in the Crash minus Foshan's advance payments.

21 On March 23, 2016, the China Union Property Insurance Co., Ltd. ("CUPIC") filed suit
22 against Foshan and Everbright to recover funds paid out as a result of the Crash.

23 CUPIC prevailed, and Foshan and Everbright were held jointly and severally liable to pay to
24 CUPIC 500,000 yuan plus a case processing fee of 8,800 yuan.

1 On April 21, 2019, Everbright filed suit against Foshan to recover costs incurred as a result
2 of litigation related to the Crash. Everbright’s lawsuit filed in China seeks compensation in the
3 amount of 1,102,818.16 yuan.

4 In the present case, filed on August 6, 2018, in the Commonwealth Superior Court, Plaintiff
5 Foshan’s complaint states that as a result of Defendant Star Marianas’ alleged negligence, Foshan
6 has been held vicariously liable and required to pay 2,677,298.56 yuan, or approximately \$423,817.70
7 US dollars.

8 Foshan claims that it is without fault in regards to the Crash, and absent its relationship with
9 Star Marianas it would not be liable for damages in any way. Furthermore, Foshan claims that because
10 of the relationship between Foshan and Star Marianas, Plaintiff has been held vicariously liable for
11 damages suffered as a result of the Crash. Foshan further claims that its vicarious liability is the direct
12 and proximate result of Star Marianas’ active and affirmative conduct.

13 As a result, Foshan claims it is entitled to complete indemnification by Star Marianas for all
14 sums for which Foshan has been held liable in relation to the Crash, plus costs of defense, costs of
15 suit, and reasonable attorney fees incurred therefrom.

16 IV. DISCUSSION

17 When Commonwealth law is silent as to the legal question at issue, Commonwealth courts
18 use “the rules of the common law, as expressed in the restatements of the law approved by the
19 American Law Institute” as the rules of decision. 6 CMC § 3401. Here, because there is no controlling
20 Commonwealth law on point, the Court looks to Restatement (Third) of Torts: Apportionment of
21 Liability § 22, for guidance.

22 Restatements states that:

23 When two or more persons are or may be liable for the same harm and one of them
24 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

1 amount paid to the plaintiff, plus reasonable legal expenses, if: [...] the indemnitee
2 was not liable except vicariously for the tort of the indemnitor [...]¹

3 Restatement (Third) of Torts: Apportionment of Liability § 22(a)(2)(i) (2000).

4 The indemnitee must extinguish the liability of the indemnitor for the indemnitee to collect
5 indemnity. Restatement (Third) of Torts: Apportionment of Liability § 22 cmt. b. “The indemnitee
6 may do so either by a settlement with the plaintiff that by its terms or by application of law discharges
7 the indemnitor from liability or by satisfaction of judgment that by operation of law discharges the
8 indemnitor from liability.” Restatement (Third) of Torts: Apportionment of Liability § 22 cmt. b; *see*
9 *also* Restatement (Third) of Torts: Apportionment of Liability § 25(a) (“When a judgment includes
10 a determination of the *entirety* of recoverable damages suffered by the plaintiff for an indivisible
11 injury and provides for their recovery by the plaintiff against one or more of the defendants, payment
12 of the *full amount* of recoverable damages constitutes a satisfaction of the plaintiff’s rights against all
13 tortfeasors legally responsible for the plaintiff’s indivisible injury.” (emphasis added)).

14 Additionally, for the indemnitee to recovery indemnity, “an indemnitee must prove that the
15 indemnitor would have been liable to the plaintiff in an amount equal to or greater than the amount
16 the indemnitee seeks.” Restatement (Third) of Torts: Apportionment of Liability § 22 cmt. c (stating
17 that “the indemnitee has the burden to prove the indemnitor’s liability to the plaintiff. The indemnitor
18 has the burden to prove any defenses it would have had against the plaintiff”).

19 The Restatement provides the following example:

20 A, who is B’s employee acting within the scope of the employment, negligently
21 injures C. C settles with B for \$100,000. B sues A for indemnity. B proves that C
22 suffered \$80,000 damages and that A would have been liable to C. Absent
23 contractual indemnity, B can recover \$80,000 in indemnity from A, plus reasonable
24 legal expenses defending C’s claim.

23 ¹ The other subsections of Section 22 refer to contractual agreements to indemnify and indemnity for the seller of products.
24 Restatement (Third) of Torts: Apportionment of Liability § 22(a)(1), (a)(2)(ii). Here, because Plaintiff Foshan does not
allege that there was an applicable contract or that the sale of a product was involved, the other subsections of Restatement
(Third) of Torts: Apportionment of Liability § 22 are inapplicable and not relevant here.

1 Restatement (Third) of Torts: Apportionment of Liability § 22 illus. 2.

2 “[A] vicariously liable person can obtain indemnity from the person whose negligence was
3 imputed only if the vicariously liable person is not independently liable.” Restatement (Third) of
4 Torts: Apportionment of Liability § 22 cmt. e.

5 Here, Defendant Star Marianas asserts in its Motion to Dismiss that Plaintiff Foshan failed to
6 (1) state a basis for vicarious liability and (2) failed to allege that Plaintiff Foshan extinguished Star
7 Marianas’ liability to third-parties. Therefore, the Court will limit its analysis to these two factors.

8 **A. Vicarious Liability**

9 Pursuant to the Restatement (Third) of Torts: Apportionment of Liability “[a] person whose
10 liability is imputed based on the tortious acts of another is liable for the entire share of comparative
11 responsibility assigned to the other [...]” Restatement (Third) of Torts: Apportionment of Liability
12 § 13. Section 13 “does not determine when the tortious conduct of one person is imputed to another
13 [--] [r]ather, the rule in [Section 13] applies when the governing law provides for such imputation.”
14 Restatement (Third) of Torts: Apportionment of Liability § 13 cmt. a.² Therefore, to determine when
15 the tortious behavior of one may be imputed to another, the Court must turn to the common law.³

16 Some examples of relationships that may make one party vicariously liable to another include:
17 a principal/agent relationship;⁴ an alter-ego relationship; or a partnership. *See Nuevo Mundo Holdings*
18 *v. PriceWaterhouseCoopers LLP*, 2004 U.S. Dist. LEXIS 780, at *9 (S.D.N.Y. Jan. 22, 2004). When
19 a party pleads that another party is vicariously liable to it, it is necessary that said party plead sufficient

20 _____
21 ² Defendant Star Marianas relies on Restatement (Second) of Torts § 886B to define what type of relationship provides a
22 basis for vicariously liability. However, Restatement (Third) of Torts: Apportionment of Liability § 22 “replaces
23 Restatement Second, Torts § 886B.” Restatement (Third) of Torts: Apportionment of Liability § 22 cmt. a.

24 ³ Statutes may also provide examples of relationships that may create vicarious liability. However, there are no statutes
that are applicable or relevant here.

⁴ *See* Restatement (Third) of Agency § 7.04 (Agent Acts with Actual Authority); Restatement (Third) of Agency § 7.05
(Principal’s Negligence in Conducting Activity Through Agent; Principal’s Special Relationship with Another Person);
Restatement (Third) of Agency § 7.06 (Failure in Performance of Principal’s Duty of Protection); Restatement (Third) of
Agency § 7.07 (Employee Acting Within Scope of Employment); and Restatement (Third) of Agency § 7.08 (Agent Acts
with Apparent Authority); *see also Kabir v. CNMI Pub. Sch. Sys.*, 2009 MP 19 ¶ 45.

1 facts to show the existence of a relationship that creates vicarious liability between the parties. *See id*;
2 *Bird v. Delacruz*, No. 04-CV-661, 2005 U.S. Dist. LEXIS 48388, at *10 (S.D. Ohio July 6, 2005);
3 *MJ & Partners Rest. Ltd. Pshp. v. Zadikoff*, 10 F. Supp. 2d 922, 931 (N.D. Ill. 1998) (“While the
4 existence and extent of the agency relationship is a question of fact, the plaintiff must sufficiently
5 allege that an agency relationship existed in order for his complaint to survive a Rule 12(b)(6) motion
6 to dismiss.”); *Fenner & Smith, Inc.*, 798 F. Supp. 1427, 1432 (D. Neb. 1992) (holding that a “bald”
7 allegation of agency “is by itself a mere legal conclusion and is therefore insufficient to withstand a
8 motion to dismiss”)

9 Here, Plaintiff Foshan stated in its pleading that “because of the relationship between Foshan
10 and [Star Marianas], [Foshan] has been held vicariously liable for damages suffered as a result of the
11 Crash.” Complaint, Paragraph 32. However, the complaint failed to specify what type of relationship,
12 if any, allegedly existed between Foshan and Star Marianas. Construed in the light most favorable to
13 Foshan, the non-moving party, the complaint alleged that Foshan contracted with Saipan Travel to
14 make travel arrangements for the passengers in the CNMI, and Saipan Travel, in turn, entered into an
15 agreement with Star Marianas to provide flights for the passengers between Saipan and Tinian.
16 Complaint, Paragraphs 11 and 12. However, these statements do not allege the existence of any
17 relationship between Plaintiff Foshan and Defendant Star Marianas and the Court ““has no duty to
18 strain to find inferences favorable to the plaintiff.”” *Syed*, 2012 MP 20 ¶ 22 (citing *Cepeda*, 3 NMI at
19 127-28). Therefore, Foshan failed to plead enough allegations to provide “fair notice of the nature of
20 the action” to put Defendant Star Marianas on notice. *Id.*, at ¶ 19 (citing *Magofna*, 1 NMI at 454).

21 **B. Extinguishing Liability**

22 As stated above, the indemnitee must extinguish the liability of the indemnitor for the
23 indemnitee to collect indemnity. *See* Restatement (Third) of Torts: Apportionment of Liability § 22
24 cmt. b. “The indemnitee may do so either by a settlement with the plaintiff that by its terms or by

1 application of law discharges the indemnitor from liability or by satisfaction of judgment that by
2 operation of law discharges the indemnitor from liability.” *Id.*; *see also* Restatement (Third) of Torts:
3 Apportionment of Liability § 16; Restatement (Third) of Torts: Apportionment of Liability § 24;
4 Restatement (Third) of Torts: Apportionment of Liability § 25. Such a rule exists because the concept
5 of indemnity benefits the indemnitor by fully discharging the indemnitor’s liability and it would be
6 unfair to allow the indemnitor to face double liability by remaining potentially liable to a plaintiff
7 after paying indemnity to the indemnitee. *See Gray v. Leisure Life Indus.*, 165 N.H. 324, 329 (2013);
8 *United States Brass Corp. v. Dormont Mfg. Co.*, 242 F. App’x 575, 579 (10th Cir. 2007) (stating that
9 “even if [the plaintiff] was without fault, its settlement did not extinguish [the defendant’s] liability
10 and [the plaintiff] cannot recover in indemnity”); *see also* Restatement (Third) of Torts:
11 Apportionment of Liability § 22 Reporter’s Note § 22 (stating that it would be unfair “to make a
12 person pay noncontractual indemnity while he was still liable to the plaintiff”). A contrary rule
13 “would also eliminate any incentive for parties to settle since settlement would not limit the
14 indemnitor’s exposure.” *AVCP Reg’l Hous. Auth. v. R.A. Vranckaert Co.*, 47 P.3d 650, 658 (Alaska
15 2002).⁵

16 Here, Plaintiff Foshan failed to allege facts that Foshan extinguished Star Marianas’ liability
17 to third-parties. Foshan’s complaint plead that there were suits filed by the passengers involved in the
18 Crash against certain companies in China. Foshan’s complaint also plead certain amounts that Foshan
19 has allegedly been obligated to pay because of these lawsuits in China. Complaint, ¶¶ 13-26.
20 However, Foshan’s complaint neither identified any of the lawsuits nor any of the judgments in China
21 and failed to state whether the alleged lawsuits in China extinguished any liability payable by Star
22 Marianas to the passengers involved in the Crash. Therefore, the complaint failed to claim that Star
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24 ⁵ *See also Northern Marianas Housing Corporation v. SSFM International, Inc.*, Civ. No. 06-0123 (NMI Super. Ct. Apr. 09, 2012) (Reissued Order Granting Motion for Judgment on the Pleadings at 7).

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Marianas has had its liability extinguished by third-parties.

V. CONCLUSION

THEREFORE, because Plaintiff Foshan failed to (1) state a basis for vicarious liability and (2) failed to allege that Plaintiff Foshan extinguished Star Marianas' liability to third-parties, Star Marianas Air, Inc.'s Motion to Dismiss for failure to state a claim under Rule 12(b)(6) of the Commonwealth Rules of Civil Procedure is hereby **GRANTED**.⁶

IT IS SO ORDERED this 29th day of April 2020.

_____/s/_____
JOSEPH N. CAMACHO, Associate Judge

⁶ Plaintiff Foshan's complaint is dismissed without prejudice.