SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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J.G. JEWELRY PTE. LTD., JDM IMPORT CO. INC.,MG WORLDWIDE LLC,MILES BERNARD, INC, ASIA PACIFIC JEWELRY, L.L.C.,

Plaintiffs,

- v -

TJC JEWELRY, INC.,SHREE RAMKRISHNA EXPORTS PVT., LTD, THE JEWELRY COMPANY, ASHISH SHAH,

Defendants.

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INDEX NO. 651469/2018

MOTION DATE 03/01/2021

MOTION SEQ. NO. 012

DECISION + ORDER ON MOTION

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SHREE RAMKRISHNA EXPORTS PVT., LTD, THE JEWELRY COMPANY

Plaintiffs,

-against-

DAVID KRISS, MICHAEL KRISS

Defendants.

Third-Party
Index No. 595171/2021

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THE JEWELRY COMPANY

Plaintiff,

-against-

DAVID KRISS, MICHAEL KRISS

Defendants.

Second Third-Party
Index No. 595210/2021

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 012) 329, 330, 331, 332, 333, 334, 335, 336, 347, 348, 349, 350, 351

were read on this motion to STRIKE PLEADINGS.

This motion marks the latest procedural skirmish in a case beset, at each turn, by accusations of gamesmanship, obfuscation, and delay. The Court has previously outlined the

factual allegations underpinning the case (*see* NYSCEF 249 [July 1, 2020 Decision and Order]). At issue here are purported "Third-Party Complaints" filed by Defendants[1] against the Kriss Brothers, the principals behind the Plaintiff entities, on February 24, 2021 (NYSCEF 318). The next day, Defendants served on Plaintiffs' counsel notice of two third-party subpoenas (the "Subpoenas"), which sought, among other things, the Kriss Brothers' personal financial information and tax returns (*see* NYSCEF 333 [subpoena to IDB Bank], 334 [subpoena to Prajapati & Co.]).

Plaintiffs move, by Order to Show Cause, to strike the Third-Party Complaints as invalid under CPLR 1007, to strike the accompanying Subpoenas, and to award sanctions against Defendants. For the reasons set forth below, the motion is granted in part and denied in part (as to sanctions).

DISCUSSION

A. Defendants' Third-Party Complaints are Procedurally Defective

The Third-Party Complaints fail to meet the requirements for impleader under CPLR 1007. The statute provides that "[a]fter the service of his answer, a defendant may proceed against a person not a party who is or may be liable to that defendant for all or part of the plaintiff's claim against that defendant." To implead a party under CPLR 1007, "the liability sought to be imposed upon a third-party defendant must arise from or be conditioned upon the

[1] The parties are grouped as follows: Plaintiffs J.G. Jewelry Pte. LTD ("JGJ"), JDM Import Co. Inc. ("JDM"), MG Worldwide LLC ("MGW"), Miles Bernard, Inc. ("Miles Bernard"), Asia Pacific Jewelry, L.L.C. ("Asia Pacific") (together with JDM, MGW, and Miles Bernard, the "JDM Entities", and the JDM Entities together with JGJ, the "Plaintiffs"); Third-Party Defendants Michael Kriss and David Kriss (the "Kriss Brothers"); and Defendants/Third-Party Plaintiffs Shree Ramkrishna Exports Pvt. Ltd. ("SRK") and The Jewelry Co. (together, "Defendants").

liability asserted against the third-party plaintiff in the main action" (*BBIG Realty Corp. v Ginsberg*, 111 AD2d 91, 93 [1st Dept 1985] [dismissing third-party complaint as "insufficient" where "[t]hird-party plaintiff . . . has not alleged any actions on the [plaintiff's] part which could give rise to liability for which the [third-party defendant] could be held accountable"]). In *Fid. Nat. Tit. Ins. Co. v Altshuler Shaham Provident Funds Ltd.*, 120 AD3d 1135 [1st Dept 2014], for example, an insurance company sued a policyholder seeking a declaratory judgment that it had properly denied coverage. The policyholder, in turn, filed a third-party complaint against his lawyer, alleging (among other things) that the lawyer had committed legal malpractice (*id.*). The First Department held that "[t]he amended third-party complaint should have been dismissed . . . because [the insurance company plaintiff] did not make a claim against [the defendant] for which [the third-party defendant] 'is or may be liable'" (*id.*).

The cases applying this impleader rule are legion (*see, e.g.*, *BBIG Realty Corp.*, 111 AD2d at 93; *Fid. Nat. Tit. Ins. Co.*, 120 AD3d at 1135; *Warner v Levinson*, 188 AD2d 268, 268 [1st Dept 1992] [dismissing third-party complaint against "a party whose liability could not arise from the liability asserted against the third-party plaintiffs in the main action"]; *Sunbelt Rentals, Inc. v Tempest Windows, Inc.*, 94 AD3d 1088, 1090 [2d Dept 2012] [dismissing third-party complaint because "the liability sought to be imposed upon [third-party defendant] did not 'arise from [and was not] conditioned upon the liability asserted against the third-party plaintiff[s] in the main action'"]; *BRC Elec. Corp. v Cripps*, 67 AD2d 899, 900 [2d Dept 1979] [liability under CPLR 1007 "must be one rooted in indemnity or contribution. Despite the liberal pleading rules applicable to third-party complaints, there is no view of the facts upon which the third-party defendants could be liable to [Plaintiffs] on their claim for conversion against defendants"]; *U.S. Bank N.A. v Kahn Prop. Owner, LLC*, 64 Misc 3d 1236(A) [Sup Ct, Suffolk County 2019] ["It is

clear that none of the third-party claims against the Gales contain the claim-over component required by CPLR 1007 and controlling case law. They are, therefore, procedurally improper."]).

Here, Defendants provide no basis for the Third-Party Complaints against the Kriss Brothers. Specifically, Defendants fail to allege that the Kriss Brothers "[are] or may be liable to [Defendants] for all or part of the plaintiff's claim against [Defendants]." Plaintiffs, in the main action, allege (among other things) that the SRK Entities used JGJ as a vehicle to steal tens of millions of dollars from the JDM Entities (*see* Am. Compl. ¶¶39-40, 126). In the Third-Party Complaints, meanwhile, Defendants allege that the Kriss Brothers diverted and transferred jewelry and funds in order to *defraud Defendants*. Indisputably, Defendants' claims about the Kriss Brothers relate to the same facts underlying the main action. The Kriss Brothers are not, however, proper third-party defendants under CPLR 1007 because "there is no view of the facts upon which the third-party defendants could be liable to [Plaintiffs]" (*BRC Elec. Corp.*, 67 AD2d at 900).

To be sure, some of the claims in the Third-Party Complaints, pleaded in the alternative should the Court find the existence of a JGJ joint venture, allege that the Kriss Brothers violated duties in connection with Plaintiff JGJ (*see* NYSCEF 318 ¶¶218-230). But these claims are premised on the Kriss Brothers' alleged breach of fiduciary duties owed to, and damages incurred by, *the SRK Entities*, not Plaintiff JGJ (*e.g.*, *id.* ¶220 ["[T]he Kriss Brothers each owed and breached their fiduciary duties to the SRK Entities"], ¶233 [same]). And while the Kriss Brothers' alleged misconduct may ultimately factor into the accounting of JGJ's profits and losses, those claims still fail to identify "any actions on the [plaintiff's] part which could give rise to liability for which the [third-party defendant] could be held accountable" (*BBIG Realty Corp.*, 111 AD2d at 93). Moreover, Defendants seek damages for their own alleged losses,

which are not dependent on their potential liability to Plaintiffs (NYSCEF 318 ¶230 ["As a direct and proximate result of the Kriss Brothers' breach of their respective fiduciary duties [to SRK], SRK has been damaged in an amount to be determined at trial . . . ."]; ¶235 ["As a direct and proximate result of the Kriss Brothers' concerted actions in the challenged transactions, SRK has been damaged in an amount to be determined at trial . . . ."]). Therefore, the Third-Party Complaints are improper.

Defendants' insistence that the Third-Party Complaints are permissible because they "arise from the identical facts and circumstances at issue in the main action" (NYSCEF 347 at 5) is unavailing. The fact that Defendants' claims arise out of the same factual circumstances is insufficient to satisfy the requirements of CPLR 1007, which permits third-party pleadings only "against a person not a party **who is or may be liable to that defendant for all or part of the plaintiff's claim against that defendant**" (CPLR 1007 [emphasis added]; *see* Siegel, N.Y. Prac. §157 [6th ed.] ["The test [under the statute] is simply whether what X has done has exposed D in any measure to the liability P is asserting."]). Defendants' apparent view – that a related party may be impleaded even if it is liable for *none* of the plaintiff's claim against the defendant in the main action – flatly contradicts the statute.

And contrary to Defendants' selective reading of the case law, courts have not expanded the scope of CPLR 1007 to sweep in related claims regardless of the third-party defendant's connection to the liability sought to be imposed in the main action. To be sure, courts have liberalized the *claims* that may be brought in a third-party action; they have not disturbed, however, the limits CPLR 1007 places on *the parties* against whom such claims may be brought. The Court of Appeals' decision in *George Cohen Agency, Inc. v Donald S. Perlman Agency, Inc.*, 51 NY2d 358 [1980] illustrates the difference. In that case, the plaintiff (Cohen) sold "a

'portfolio' of insurance business" to the defendants (Perlman, to simplify things) in exchange for promissory notes (*id.* at 361). When Perlman defaulted under the notes, Cohen sued (*id.*). Perlman, in turn, sought to implead two non-parties (including an insurer, Continental) for their role in "knowingly inducing [Perlman] to purchase the worthless package of insurance business" (*id.*). Perlman's claims against Continental included "indemnity and contribution," but were more broadly "grounded upon the third-party defendants' alleged complicity in a conspiracy to defraud Perlman" (*id.* at 362).

Continental moved to dismiss Perlman's third-party action on the grounds "(1) that CPLR 1007 does not permit a third-party plaintiff to demand damages in excess of those demanded in the main action; (2) that no third-party action is maintainable where the third-party plaintiff alleges facts which negate liability on the main action; and (3) that recognition of a third-party action would in the circumstances of this case, prejudice Continental by impeding its ability to 'remove' the case to Federal court" (*id.*; *see id.* at 361 [calling the first two "significant issues"]). None of these issues, it must be noted, are present here.

The Court in *Cohen* permitted the impleader. In doing so, it noted that "[t]he language of CPLR 1007 serves only to identify the persons against whom a third-party claim may be brought," but "places no limit upon the amount which may be recovered or upon the legal theories which may be asserted as a basis for the claim" (*id.* at 365). So long as the third-party defendant falls within the ambit of CPLR 1007, the third-party plaintiff may then assert claims against it in excess of – and even contradictory to – the main plaintiff's claims against the defendant. "Having successfully brought the new third-party defendant into the lawsuit," in other words, the third-party plaintiff is free to bring in additional claims. But *Cohen*'s approving nod to "the modern spirit of liberal pleading" did not erase the basic requirements of CPLR

1007. In fact, the Court's decision reaffirmed the conditional nature of third-party liability, holding "**[i]nasmuch as Perlman claims that Continental is responsible in part for any potential liability to Cohen**, Perlman may implead Continental, making the insurer a party to the suit" (*id.* at 365 [emphasis added]). Because Defendants' fail to make a similar showing here, Defendants' reliance on *Cohen* is misplaced.

The other cases on which Defendants rely are similarly unavailing. In *JP Morgan Chase Bank, N.A. v Strands Hair Studio, LLC*, 84 AD3d 1173 [2d Dept 2011], for instance, Defendants latch on to the court's finding that "the third-party complaint may be based on a theory of liability different from and independent of the cause of action pleaded against the primary defendant" (*id.* at 1174). That is true, as far as it goes. Again, CPLR 1007 does not limit the causes of action that may be brought against a third-party defendant. But the third-party defendant first must be "successfully brought . . . into the lawsuit" (to use *Cohen*'s words), and that can only happen under CPLR 1007 if "the liability sought to be imposed . . . arise[s] from or [is] conditioned upon the liability asserted against the third-party plaintiff in the main action" (*BBIG Realty Corp.*, 111 AD2d at 93). Indeed, the trial court in *JP Morgan* cited that exact language in permitting the third party complaint to stand (*JP Morgan Chase Bank, N.A. v Strands Hair Studio, LLC*, 2009 N.Y. Slip Op. 33136[U] [Sup Ct, Nassau County 2009]).[2] And in *Gross v DeMeglio*, 143 AD2d 609 [1st Dept 1988], another case Defendants cite, the third-party plaintiff's claim sounded in indemnity, even if the particulars went beyond the theory of

[2] In *JP Morgan*, a bank sued a salon under a loan agreement and an individual under a related guaranty. The guarantor, in turn, sued a third-party (Orr), claiming that the third-party was at least partly responsible for the defendants' failure to pay the loan. The trial court allowed the impleader because "[t]he claims made against Orr thus arise from the debt Payne owes to the plaintiff" (*id.*). Although "perhaps not classic in form, the claim against Orr thus satisfies CPLR 1007" (*id.*).

liability underlying the main action (*id.* at 609-610 ["As DeMeglio was about to commence the third-party action against Kochonies for indemnification, she learned that title to the property had been transferred to his stepdaughter, Laurie Bell."]).

In sum, the Third Party Complaints fail to satisfy CPLR 1007. The Court takes no position as to the merits of Defendants' assertions against the Kriss Brothers, or as to whether they may be able to pursue their claims by seeking leave to amend their existing counterclaims, subject to the requirements of CPLR 3019 (*see U.S. Bank N.A. v Kahn Prop. Owner, LLC*, 64 Misc 3d 1236(A) [Sup Ct, Suffolk County 2019] [noting that third-party pleading was "procedurally improper and should have been asserted in a separate action against the Gales, **or the Gales should have been joined as additional defendants on the counterclaims (see, CPLR 3019 [d])**"] [emphasis added]; *see also* Siegel, N.Y. Prac. § 224 (6th ed.) ["If D has a claim against P and some other person, X, who is not a party, the CPLR allows D to interpose the claim against P while simultaneously joining X as an adverse party on the claim."]).

B. The Subpoenas are Stricken

Because the Subpoenas seek information purportedly "necessary to prosecuting both the Counterclaims and Third-Party Complaints" (NYSCEF 347 at 13; *see* NYSCEF 333 at 1 [Subpoena to IDB Bank referencing main action and third-party action]), they are rendered at least partially defective as a result of striking the Third Party Complaints. To avoid misleading the subpoenaed entities about the scope of the action before the Court, the Subpoenas are

stricken *in their entirety*, but without prejudice to Defendants re-issuing the Subpoenas in order to prosecute their counterclaims.

C. Sanctions Are Not Warranted

Finally, although the Court finds that Defendants' view of the scope of CPLR 1007 is incorrect, it does not find their arguments to be frivolous. Accordingly, Plaintiffs' request for sanctions is denied.

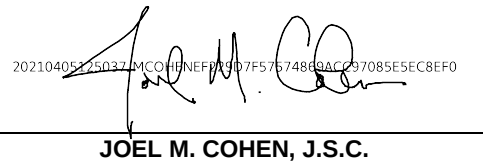
* * * *

Accordingly, it is

ORDERED that the branch of Plaintiffs' motion seeking to strike the Third-Party Complaints and the Subpoenas is GRANTED; and it is further

ORDERED that the branch of Plaintiffs' motion seeking sanctions is DENIED.

This constitutes the Decision and Order of the Court.



4/5/2021
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE