First Advantage LNS, Inc. v LexisNexis Risk Solutions Inc.
2017 NY Slip Op 30229(U)
January 31, 2017
Supreme Court, New York County
Docket Number: 653812/2015
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 2

----------X

FIRST ADVANTAGE LNS, INC. & FIRST ADVANTAGE LNS SCREENING SOLUTIONS, INC.,

Plaintiffs,

DECISION & ORDER

-against-

Index No. 653812/2015

LEXISNEXIS RISK SOLUTIONS INC.,

Mot. Seq. 006

Defendant.

----------X

KATHRYN E. FREED, J.S.C.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIRMATION ANNEXED	58, 60-62 (Exs. A, B)
MEMORANDUM OF LAW	..... 59 .....
PLAINTIFFS' OPPOSITION MEMORANDUM OF LAW	..... 64 .....
REPLY MEMORANDUM OF LAW	..... 65 .....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this action, plaintiffs First Advantage LNS, Inc. (FA LNS) and First Advantage LNS Screening Solutions, Inc. (FA Screening) seek a declaration that defendant LexisNexis Risk Solutions Inc. (LexisNexis) is contractually obligated to indemnify them for certain present and future losses. LexisNexis moves, pursuant to CPLR 3211 (a) (1), (a) (2), and (a) (7), for an order dismissing the first amended complaint. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motion is **granted**.

On January 16, 2013, plaintiffs, LexisNexis, and nonparty Reed Elsevier Group PLC, entered into a purchase agreement (purchase agreement), pursuant to which plaintiffs acquired

two of LexisNexis's wholly-owned subsidiaries, nonparties LexisNexis Screening Solutions, Inc. (LN Screening) and LexisNexis Occupational Health Solutions (LN Occupational).

Through LN Screening and LN Occupational, LexisNexis had provided certain of its customers, primarily employers, with a variety of investigative services, including background check reports, drug testing, and other occupational health services, for screening prospective and current employees and volunteers. Following the closing of the purchase agreement on February 28, 2013, LN Screening was renamed to FA Screening.

Article 9 of the purchase agreement required LexisNexis to indemnify plaintiffs for losses falling within certain defined categories and subcategories, including losses arising from a federal class action brought pursuant to the Fair Credit Reporting Act (15 USC § 1681, *et seq.* [FCRA]) (*see Goode & Goodman, on behalf of themselves & others similarly situated v LexisNexis Risk & Info. Analytics Group, Inc.*, US DC, ED PA, Civil Action No. 2:11-CV-2950-JD [*G&G* action]), and other claims. The *G&G* action, commenced prior to the execution of the purchase agreement, was expressly included in an indemnification provision contained in the said agreement.

There is no dispute that, to the extent that it operated as a consumer reporting agency, LexisNexis was subject to the FCRA, which regulates, among other things, the collection, maintenance, and disclosure of information, public or otherwise, about consumers by consumer reporting agencies.

The plaintiffs in the *G&G* action, on behalf of themselves and a defined class, allege that LexisNexis failed to comply with the FCRA regulations in operating a database known as Esteem, used to assist employers in identifying employees with a history of theft or fraud (*see*

G&G action amended complaint, ¶¶ 11-50). Specifically, they allege that LexisNexis violated the FCRA by, among other things, providing potential employers with Esteem reports without providing potential job applicants with advance notice of those reports or an opportunity to contest the reported information (*see id.*, ¶¶ 2, 48-50).

Briefly, the plaintiffs in the *G&G* action allege two claims for class relief. First, they claim that LexisNexis violated FCRA § 1681b (b) (3) (A) by "taking adverse actions related to pending employment applications *before* [sending] Pre-Adverse Action Notices on behalf of ESTEEM employer-subscribers" (*id.*, ¶ 124) (*emphasis in original*). They also allege that LexisNexis violated FCRA § 1681g (a) by failing to provide consumers with the admission statement forming the basis of the Esteem theft reports, as required by the statute (*see id.*, ¶¶ 126-132).

The plaintiffs in the *G&G* action further assert individual claims arising from allegations that LexisNexis violated FCRA § 1681e (b) by "fail[ing] to follow reasonable procedures designed to assure maximum possible accuracy" in its reports (*id.*, ¶¶ 133-149).

On December 29, 2014, the court in the *G&G* action approved a settlement and release of the FCRA claims asserted on behalf of the class, other than claims for actual damages asserted by individual class members (*see G&G* action settlement § 1.4). Such claims were expressly excluded from the settlement and thus preserved (*see id.*).

Two former class members in the *G&G* action commenced individual actions against FA Screening to recover actual damages. Plaintiffs commenced this action seeking a declaration that LexisNexis must indemnify them for losses incurred, or to be incurred, as a result of each of the actions by the individuals, on the ground that the plaintiffs in each action allege FCRA

violations by FA Screening which occurred prior to the execution of the purchase agreement, and thus come within the scope of the purchase agreement indemnification provision.

On March 17, 2014, Charmaine Freckleton commenced an action captioned *Freckleton v Target Corp. & First Advantage LNS Screening Solutions, Inc.* (US DC MD, case no. WDQ-14-0807 [*Freckleton* action]). In the *Freckleton* action, the plaintiff alleges that FA Screening provided an Esteem background report that violated the FCRA's maximum possible accuracy requirement, and seeks actual damages suffered as a result of the alleged violation.

Plaintiffs demanded indemnity from LexisNexis for losses arising from the *Freckleton* action. LexisNexis rejected that request on the ground that the claim asserted against FA Screening in the *Freckleton* action had not been asserted as a class claim in the *G&G* action.

Plaintiffs allege that, in September 2015, they learned that 23 complaints would be filed against them. On October 19, 2015, plaintiffs demanded that LexisNexis indemnify them with respect to each of those complaints. On November 5, 2015, LexisNexis rejected the demand on the ground that, pursuant to the purchase agreement, it was not required to indemnify plaintiffs for losses arising out of third-party claims made more than 24 months after the closing of the purchase agreement transaction.

On November 25, 2015, the 23 claims were filed in a single class action, captioned *Baker v First Advantage Screening Solutions, Inc.* (US DC ED NY, case no. 15-CV-06317 [*Baker* action]). Plaintiffs contend that they are entitled to indemnification on the grounds that the *Baker* action is premised on the actual damages claims preserved by the settlement agreement in the *G&G* action, and that the plaintiffs in the *Baker* action seek actual damages for false Esteem reports issued to their employers.

In their first amended complaint, plaintiffs seek a judicial declaration that LexisNexis is contractually bound by the purchase agreement to indemnify them for their losses, costs, and fees allegedly incurred in connection with the *Freckleton* action, and the losses, costs, and fees that plaintiffs anticipate that they will incur in connection with the *Baker* action.

LexisNexis seeks to dismiss the amended complaint in its entirety.

Initially, the parties dispute whether a justiciable controversy exists regarding LexisNexis's contractual obligation to indemnify plaintiffs as a result of the commencement of the *Freckleton* and *Baker* actions and, thus, whether this Court may grant declaratory relief herein.

> "A cause of action for declaratory relief accrues when there is a bona fide, justiciable controversy between the parties. A justiciable controversy must involve a present, rather than hypothetical, contingent or remote, prejudice to the plaintiff. The dispute must be real, definite, substantial, and sufficiently matured so as to be ripe for judicial determination"

(*Zwarycz v Marnia Constr., Inc.*, 102 AD3d 774, 776 [2d Dept 2013] [internal quotation marks and citations omitted]; *see* CPLR 3001).

The issues presented here are ripe for judicial determination. The *Freckleton* action has been commenced, LexisNexis has rejected plaintiffs' demand for indemnification, and plaintiffs allege that, as a result of that action, they have suffered losses, as defined by the purchase agreement, that come within the scope of the indemnification provision. "A dispute matures into a justiciable controversy when a plaintiff receives direct, definitive notice that the defendant is repudiating his or her rights" (*Zwarycz v Marnia Constr., Inc.*, 102 AD3d at 776).

Similarly, the *Baker* action has been commenced, and LexisNexis has rejected plaintiffs'

demand for indemnification. Plaintiffs' failure to allege that they have already sustained damages (*see* amended complaint, ¶ 38 ["LexisNexis's refusal to honor its contractual indemnification obligations under Article IX of the Purchase Agreement threatens to cause First Advantage to suffer losses, costs, and fees for which it should not be liable"]) does not render the claim non-justiciable, inasmuch as such damages are likely to occur. "[W]here the practical likelihood is that the future contingency will occur, the action may proceed" (*Prodell v State of New York*, 211 AD2d 966, 967-968 [3d Dept 1995], citing *Associated Indem. Corp. v Fairchild Indus.*, 961 F2d 32, 35 [2d Cir 1992]).

Therefore, the issues of indemnification with respect to plaintiffs' losses allegedly arising out of the *Freckleton* and *Baker* actions are ripe for adjudication.

On a motion addressed to the sufficiency of the pleadings, the court must accept each and every allegation in the complaint as true, and liberally construe those allegations in the light most favorable to the pleading party (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see* CPLR 3211 [a] [7]). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d at 87-88).

"[W]here a written agreement . . . unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes documentary evidence warranting the dismissal of the complaint pursuant to CPLR 3211 (a) (1), regardless of any extrinsic evidence or self-serving allegations offered by the proponent of the claim" (*150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]; *see* CPLR 3211 [a] [1]).

The parties agree that the purchase agreement is a binding agreement, although they dispute whether the indemnification obligation imposed on LexisNexis by Article IX of the

purchase agreement was triggered by the commencement of the *Freckleton* and *Baker* actions. While LexisNexis contends that the declaratory judgment claim is flatly contradicted by the terms of the indemnification provision, plaintiffs contend that those actions fall squarely within the parameters of that provision.

> "A contract is . . . interpreted so as to effectuate the intention of the parties as expressed in the unequivocal language used . . . [w]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed"

(*Weissman v Sinorm Deli*, 88 NY2d 437, 446 [1996] [internal quotation marks and citations omitted]; *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989])

The indemnification provision at issue provides, in relevant part:

> "[s]ubject to the provision of this Article IX, from and after the Closing, Seller [LexisNexis] shall indemnify and hold harmless each of the *Buyer Indemnified Parties* from, against and in respect of any and all *Losses* that such Buyer Indemnified Party may suffer, accrue or incur, to the extent resulting from, attributable to, based upon or arising out of . . . the matters set forth on *Schedule 9.1 (j)*"

(purchase agreement § 9.1 [*emphasis added*]).

The purchase agreement defines "Buyer Indemnified Parties" to include affiliates of First Advantage, such as FA Screening (*see id.* § 1.1). It defines "Losses" as "any Liabilities, obligations, damages, losses, costs, expenses, penalties, fines and judgments (at equity or at law, including statutory and common) and damages whenever arising or incurred (including reasonable attorneys' fees and expenses), but excluding punitive damages, except to the extent required to be paid to a third party" (*id.*).

Schedule 9.1 (j) of the purchase agreement sets forth the criteria that must be met before

LexisNexis's contractual obligation to indemnify will accrue. Subsection "i" of Schedule 9.1 (j) provides that LexisNexis's indemnification obligation covers losses from claims arising out of claims specifically enumerated in Schedule 9.1 (j). The claims listed include the *G&G* action, but do not include either the *Freckleton* or *Baker* actions (*see id.*, Schedule 9.1 [j]). Therefore, that subsection is not relevant to this discussion.

Subsection "ii" of Schedule 9.1 (j) provides plaintiffs with a right to indemnification from LexisNexis, in relevant part, as follows:

> "Any *Third Party Claims* that are made within twenty-four (24) months of Closing that arise out of or are related to (I) the same or similar or similarly situated parties . . . and (II) the same or substantially similar legal argument applied to the same or similar set of facts and/or the same subject matter as the matters set forth below [in Schedule 9.1 (j)] , to the extent such matters are claims by . . . *a private class action*"

(*id.* [*emphasis added*]).

Schedule 9.1 (j) (ii) defines a "private class action" as a class action brought by private individuals, rather than one brought by a governmental entity (*see id.*).

In addition, the purchase agreement provides that, for a claim to qualify as a "Third Party Claim," there must be a "filed complaint or the actual commencement of any audit, investigation, action or proceeding" (*id.* § 9.3 [a]).

Thus, Schedule 9.1 (j) (ii) of the purchase agreement obligates LexisNexis to indemnify plaintiffs for certain losses arising from claims made in a private class action similar to those made in an action or claim listed in that Schedule, provided that the unlisted claim was formally commenced within 24 months after the closing of the purchase agreement.

The *Freckleton* action does not satisfy that criteria. While the *Freckleton* action was filed by a

member of the class in the *G&G* action within 24 months after the closing of the settlement agreement, the claim asserted in both the *Freckleton* action and the *G&G* action was never asserted on behalf of the class in the *G&G* action but, rather, was asserted only as claim by an individual for actual damages (*see* *G&G* action complaint, ¶¶ 133-149). Thus, the said claim is expressly excluded from the settlement of the *G&G* action.

Plaintiffs allege that the single claim asserted in the *Freckleton* action was based on allegations that plaintiffs failed to satisfy their statutory obligation to use the maximum possible accuracy (*see* FRCA § 1681e [b]) on the ground that Freckleton's admission statement was labeled "verified," when it had not been (*see* amended complaint, ¶¶ 20-22).

The *G&G* action was a private class action only to the extent that it included claims relating to pre-adverse action notices in violation of FCRA § 1681 (b) (3) (A) and the failure to furnish copies of verified admission statements in full file disclosures (*see* FCRA § 1681g [a]) (*see G&G* action complaint, ¶¶ 133-149).

Contrary to plaintiffs' contention, whether the *Freckleton* action satisfies some of the prerequisites for indemnification is not relevant. "It is a cardinal rule of contract construction that a court should avoid an interpretation that would leave contractual clauses meaningless . . . [c]ourts are obligated to interpret a contract so as to give meaning to all of its terms" (*U.S. Bank N.A. v Lightstone Holdings LLC*, 103 AD3d 458, 459 [1st Dept 2013] [internal quotation marks and citation omitted]).

For the same reasons, the *Baker* action does not satisfy the criteria necessary to trigger LexisNexis's contractual indemnification obligation. The claims in the *Baker* action are for actual damages sustained by an individual and are expressly excluded from the settlement of the class claims in the *G&G* action. Nothing in the purchase agreement can be interpreted as obligating LexisNexis to

indemnify plaintiffs for non-class claims which were not settled in the *G&G* action.

In addition, the claims in the *Baker* action were asserted outside the 24- month period within which claims triggering LexisNexis's indemnification obligation were required to be filed. Plaintiffs allegedly learned in September 2015 that 23 more claims would be filed against them, and the *Baker* action asserting those claims was commenced on November 25, 2015. Both of those dates are well past 24 months after the closing of the purchase agreement on February 28, 2013.

Even assuming that plaintiffs' allegations were true, they are not entitled to indemnification for losses sustained as a result of the *Freckleton* and *Baker* actions given the clear and unambiguous terms of the purchase agreement.

In light of the foregoing, it is thereby:

ORDERED that the motion to dismiss the first amended complaint is granted, and the first amended complaint is dismissed in its entirety, with costs and disbursements to defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendant; and it is further,

ORDERED that defendant shall serve this order, with notice of entry, upon counsel for plaintiffs within 30 days after this order is uploaded to NYSCEF; and it is further,

ORDERED that this constitutes the decision and order of the court.

Dated: January 31, 2017

ENTER:

KATHRYN E. FREED, J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT