

<b>Beta Holdings, Inc. v Goldsmith</b>
2017 NY Slip Op 30641(U)
April 4, 2017
Supreme Court, New York County
Docket Number: 652401/2012
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 48

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BETA HOLDINGS, INC., BETA INTERNATIONAL,  
INC., BETA HOLDINGS HOLDCO, LLC, BETA  
ACQUISITION I CO., INC., and BETA  
ACQUISITION II CO., INC.,

Plaintiffs,

-against-

ROBERT J. GOLDSMITH and RAFAEL RAMOS,

Defendants,

-----x

JEFFREY K. OING, J.

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DECISION AND ORDER

Plaintiffs, Beta Holdings, Inc. ("BHI"), Beta International, Inc. ("BI"), Beta Holdings Holdco., LLC ("Beta Holdco"), Beta Acquisition I Co., Inc. ("Acquisition I"), and Beta Acquisition II Co., Inc. ("Acquisition II") (collectively, "Beta"), move, pursuant to CPLR 3212(e), for partial summary judgment as to damages on their third cause of action, which seeks indemnification for the payment of certain tax liabilities of BHI, the company that defendants, Robert J. Goldsmith and Rafael Ramos, sold to plaintiffs Beta Holdco, Acquisition I, and Acquisition II pursuant to the terms of a stock Purchase Agreement ("SPA"). The liabilities, which resulted from the Internal Revenue Service ("IRS") reclassification of a portion of the salaries that BHI paid to defendants as profit to BHI, were paid by BI and BHI.

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Defendants, Robert J. Goldsmith and Rafael Ramos, move: (1) for an order to quantify amounts owed to them by Beta under a secured promissory note, certain series B and C notes, and a guarantee agreement; and (2) for summary judgment as to the amount of attorneys' fees and costs that defendants have incurred in pursuing those claims, and in defending themselves against plaintiffs' other indemnification claims, which were dismissed.

These two motions are consolidated for disposition.

The facts underlying these motions are set forth in this Court's December 12, 2014 (NYSCEF Doc. No. 271) and April 25, 2016 (NYSCEF Doc. No. 397) decision and order. Familiarity is presumed and facts will be repeated as necessary.

**Discussion**

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The December 12, 2014 decision and order granted plaintiffs summary judgment, as to liability, on their claim for indemnification for the payment of BHI's taxes, which totaled \$2,227,974.59 (Thompson Affirm., 9/30/16, at 2). Although they do not dispute plaintiffs' calculation of that sum, defendants argue that plaintiffs acted unreasonably in not making payments to the IRS until March 2013, a full year after the IRS sent its first assessment, and eight months after plaintiffs commenced

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this action. To support their argument, defendants point to section 12.1 of the SPA, which provides, in relevant part, that:

[t]he Sellers shall reimburse the Buyer for any Taxes that are the responsibility of the Sellers as provided for above in this Section 12.1(a) within ten (10) business days after receiving notice and evidence of payment of such taxes by or on behalf of the Buyer or any Acquired Entity.

(Thompson Affirm., Ex. 1 at 68). This argument is unavailing.

While, indeed, defendants were not required to reimburse plaintiffs prior to ten days after receiving notice of a tax payment by, or on behalf of, plaintiffs, defendants knew, at least as early as July 2011, that the IRS was demanding documentation in relation to BHI's pre-closure tax filings (Thompson Affirm. in further support, Ex. A). Nothing in the SPA, or in any other governing document, barred defendants from engaging and negotiating with the IRS, and ultimately, paying BHI's tax liability. Indeed, Beta's attorney invited defendants to do so (Id.), but they chose not to. As such, defendants' argument that plaintiffs could have acted more expeditiously is pure sophistry.

Plaintiffs argue that to the extent that a certain escrow fund established by the parties is insufficient to indemnify plaintiffs for their payment of BHI's tax liability defendants are personally liable to make up the difference. Given that position is plainly based on a theory of unjust enrichment

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(Plaintiffs' Reply Memo. at 5 and n 1), and this Court's dismissal of plaintiffs' seventh cause of action, which alleged unjust enrichment based, in part, on the excessive salary payments, as determined by the IRS (NYSCEF Doc. No. 271), this argument to hold defendants personally liable is unavailing.

Accordingly, plaintiffs' motion for partial summary judgment as to their third cause of action is granted as to liability only. The issue of the amount of damages is respectfully referred to a Special Referee/Judicial Hearing Officer for disposition.

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Notwithstanding plaintiffs' argument to the contrary, defendants particularized the recovery that they seek from each of the several Beta entities. Specifically, defendants Goldsmith and Ramos assert that they are owed, respectively, \$1,000,450 and \$176,550 from Acquisition II, as the obligor on the Series B notes; \$408,850 and \$72,150 from Acquisition II, as the obligor on the Series C notes; and \$2,805.600 and \$194,440 from BHI, as obligor on the secured promissory note, payment of which is guaranteed by BI (Defendants' Memo. in support at 4).

Plaintiffs' contention that these obligations are all nonrecourse is belied by the texts of the instruments, which are

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silent on the subject. The SPA provides for indemnification of defendants at section 10.2 (b), which states, in relevant part,

The Buyer Parties [subject to limitations not relevant here] shall indemnify and hold harmless the Sellers and their respective heirs, successors and assigns (the [']Seller Indemnified Parties [']) ... against and in respect of any and all Damages arising out of, resulting from or incurred in connection with ... (ii) the breach by any Buyer Party of any covenant or agreement to be performed by it under this Agreement or in any other Transaction Document ... ."

The "Buyer Parties" are Beta Holdco, Acquisition I, and Acquisition II (SPA at 2). The "damages" recoverable under section 10.2 are defined as:

any and all claims, costs, expenses, damages, Liabilities, losses or deficiencies (including, without limitation, counsel fees and other costs and expenses incident to any suit, action or proceeding).

(SPA § 10.2(a)). "Transaction Documents" are defined to include the Series A, Series B, and Series C notes, as well as the secured promissory note (SPA at 1 and 14; § 2.1 (d)).

Acquisition II was the maker of the Series A, Series B, and Series C notes.

The record demonstrates that plaintiffs have defaulted on the Series A, Series B and Series C notes, as well as on the secured promissory note, and have paid defendants nothing for BHI, other than the initial cash down payment. Plaintiffs' argument that the parties understood that payments under those instruments were contingent on BI's profitability is unpersuasive

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inasmuch as the parties closed on the sale of BHI in December 2010, and the initial payment on the secured promissory note was due, but not paid, on January 11, 2011, well before BI's post-closure profitability could be gauged. Under these circumstances, defendants are entitled to recover from the "Buyer Parties," the amounts due on the Series A, B, and C notes, and the attorney's fees and costs that defendants incurred in litigating the counterclaims on which they have prevailed. In addition, defendants are entitled to recover, in principle, against BHI and BI on the secured promissory note.

Accordingly, that branch of defendants' motion for an order to quantify amounts owed to them by Beta under a secured promissory note, certain series B and C notes, and a guarantee agreement is granted to the extent of referring the calculation of that amount to a Special Referee/Judicial Hearing Officer for disposition.

Defendants next argue that they also are entitled pursuant to SPA §§ 10.2(b) and 10.4, to recover the attorneys' fees that they incurred in defending against plaintiffs' fraud claims, all of which were dismissed. In addition to providing for indemnification for breaches of contract, section 10.2(b) provides for indemnification for misrepresentation or breach of warranty, any Assumed Liability, which is defined as certain

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trade payables, certain operating expenses, and obligations arising under certain contracts (SPA at 2). Although none of these categories encompasses attorneys' fees, defendants may seek recovery of those fees pursuant to SPA § 10.4. That section sets forth the intra-party procedures to be followed "[i]n the event that an Indemnified Party determines that it has a claim for damages against an Indemnifying Party hereunder," and provides that:

[i]n the event that the Indemnified Party is required to institute legal proceedings in order to recover Damages hereunder, the cost of such proceedings (including costs of investigation and reasonable attorneys' fees and disbursements) shall be added to the amount of Damages payable to the Indemnified Party if the Indemnified Party recovers damages in such proceedings.

(SPA § 10.4).

Plaintiffs argue otherwise. Plaintiffs point out that defendants did not "institute" this action. That fact, however, does not render defendants' claim for attorney's fees unsustainable. Nothing in the SPA contemplates a race to the courthouse door, and plaintiffs do not argue to the contrary. Realizing the argument's shortcomings, plaintiffs rely on the last sentence of SPA § 10.4, which provides:

In the event that a party hereto claiming to be an Indemnified Party institutes legal proceedings in order to recover Damages hereunder and the applicable court refuses to award any Damages to such party, such party shall reimburse the defending party for the cost of

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such proceedings (including costs of investigation and reasonable attorneys' fees and disbursements).

(emphasis added). Plaintiffs point out that this Court's April 25, 2016 decision and order awarded them damages on their claim for indemnification of the payment of BHI's tax debt, and they argue that, therefore, defendants are precluded from recovering their attorneys' fees. Plaintiffs' argument fails.

While plaintiffs sought damages pursuant to SPA §§ 10.2(a) and 12.1(a) (Complaint, ¶¶ 136, and 137), they were not awarded any damages "hereunder," that is, pursuant to SPA § 10.4. SPA § 12.7 provides that:

[e]xcept as otherwise provided in this Article XII, the procedures set forth in Section 10.3 shall govern with respect to any rights to indemnification arising out of any ... proceeding regarding Taxes of any Acquired Entity ... attributable to the Pre-Closing Tax Period.

SPA § 10.3 contains no provision similar to the last sentence of section 10.4.

Accordingly, that branch of defendants' motion for summary judgment for attorney's fees and costs is granted as to liability only. The issue as to the amount of reasonable attorney's fees and costs is respectfully referred to a Special Referee/Judicial Hearing Officer for disposition.

**Set Off**

Both the SPA and the instruments upon which defendants seek to recover provide that while plaintiffs' obligations to pay

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under those instruments is subject to the issuer's right to set off any amount due against any amount owed by defendants as indemnification for the payment of a tax liability, defendants waive any right to "set off or offset" such debt against the amount owed to them under the instrument. Thus, pursuant to defendants' waivers, defendants may not reduce amounts that they owe to plaintiffs by such amounts as plaintiffs may owe them. Nonetheless, these waivers do not bar defendants' recovery of attorney's fees, particularly where such amount exceeds defendants' debts to plaintiffs. Accordingly, to the extent defendants' recovery exceeds the amount that they owe to plaintiffs, they are entitled to a judgment in the amount of such excess.

Accordingly, it is hereby

ORDERED that plaintiffs' motion for partial summary judgment as to their third cause of action is granted as to liability only; and it is further

ORDERED that the issue of the amount of damages is respectfully referred to a Special Referee/Judicial Hearing Officer for disposition; and it is further

ORDERED that branch of defendants' motion for an order to quantify amounts owed to them by Beta under a secured promissory note, certain series B and C notes, and a guarantee agreement is

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granted to the extent of referring the calculation of that amount to a Special Referee/Judicial Hearing Officer for disposition; and it is further

ORDERED that branch of defendants' motion for summary judgment for attorney's fees and costs is granted as to liability only; and it is further

ORDERED that the issue as to the amount of reasonable attorney's fees and costs is respectfully referred to a Special Referee/Judicial Hearing Officer for disposition; and it is further

ORDERED that the above-noted references to the Special Referee/Judicial Hearing Officer is to hear and report with recommendations, or if the parties so-agree to hear and determine; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or [spref@nycourts.gov](mailto:spref@nycourts.gov)) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the "references" link under "Courthouse Procedures") shall assign this matter to an available Special Referee/Judicial Hearing Officer to hear and report or hear and determine as specified above; and it is further

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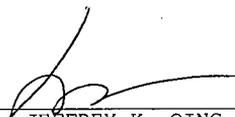
ORDERED that counsel shall immediately consult one another and counsel for plaintiffs shall, within fifteen (15) days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee Part in accordance with the Rules of that Part; and it is further

ORDERED that any motion to confirm or reject the Report of the Special Referee/Judicial Hearing Officer shall be made within the time and in the manner specified in CPLR 4403 and 22 NYCRR S 202.44.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 4/4/17

  
HON. JEFFREY K. OING, J.S.C.