

Fleetwood Fin. v Walter J. Dowd, Inc.

2013 NY Slip Op 32335(U)

September 30, 2013

Supreme Court, New York County

Docket Number: 113484/2011

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 113484/2011
FLEETWOOD FINANCIAL
vs.
WALTER J. DOWD, INC.
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1, 2, 3, 4, 5, 6,

Answering Affidavits — Exhibits _____ No(s). 7

Replying Affidavits _____ No(s). 8

Upon the foregoing papers, it is ordered that this motion is

FILED

OCT 02 2013

NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9/30/13


HON. EILEEN A. RAKOWER J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
FLEETWOOD FINANCIAL, A DIVISION OF IDB
LEASING, INC.,

Plaintiff,

Index No.
113484/2011

Mot. Seq. No. :
002

- against -

Decision and
Order

WALTER J. DOWD, INC. AND GORDON CHARLOP,
Defendants.

-----X
GORDON CHARLOP,

Third Party Plaintiff,

Index No.
590096/2012

FILED

-against-

OCT 02 2013

DME SECURITIES LLC, MICHAEL BERGER,
JOHN COLVIN AND WARREN MEYERS,

**NEW YORK
COUNTY CLERK'S OFFICE**

Third Party Defendants.

-----X
HON. EILEEN A. RAKOWER

Plaintiff Fleetwood Financial, A Division of IDB Leasing, Inc. ("Plaintiff") commenced this action seeking payments allegedly due pursuant to a lease for computer equipment and furniture, entered into by Walter J. Dowd Inc. ("Dowd"), the corporate defendant, and Gordon Charlop ("Charlop"), the guarantor, in 2007.

On or about February 8, 2012, Charlop filed a third party complaint seeking indemnification against third-party defendant DME Securities LLC ("DME") and contribution against Michael Berger, John Colvin, and Warren Meyers with respect

to the amounts sought by Plaintiff. The claim against DME is based on the allegations that DME employed third party defendants Berger, Colvin, and Meyers and used the equipment at issue for its sole and exclusive benefit. The claim against Berger, Colvin and Meyers is based on the allegations that those individuals “each agreed to be personally responsible for 25% of the payments due under the Lease Agreement in the event Charlop was required to make payments under the Guaranty.” On or about April 16, 2012, third party defendants interposed their answers to the third party complaint and filed an Amended Answer on May 7, 2012.

By Decision and Order filed June 7, 2012, this Court granted Plaintiff’s motion for summary judgment and directed entry of judgment against both defendants Dowd and Charlop in the amount of \$50,547.97, plus interest. On or about August 14, 2012, Charlop paid to Plaintiff the sum of \$56,343.16 in full satisfaction of Plaintiff’s judgment.

Defendant/third party plaintiff Charlop and third party defendants exchanged written discovery, but conducted no depositions. Charlop filed the Note of Issue in this case on February 21, 2013.

Presently before the Court is third party defendants’ DME, Berger, Colvin, and Meyers’ motion, pursuant to CPLR §3212, for summary judgment for an Order dismissing Charlop’s third party Complaint.

In support of their motion for summary judgment, third-party defendants submit the attorney affirmation of Jeffrey J. Calabrese, affidavit of David M. Elias, President of DME, and the affidavits of Meyers, Berger, and Colvin. Plaintiff opposes the motion made by Berger, Colvin, and Meyers, but does not oppose DME’s motion for summary judgment.

As alleged in Meyers’ affidavit, Charlop, Berger, Colvin and Meyers were shareholders of Dowd, which provided execution services on the floor of the New York Stock Exchange. In or around June 2007, Dowd leased office equipment under various lease agreements which are the subject of this action and Charlop signed a personal guaranty of the office equipment lease. On or about June 12, 2007, Charlop, Colvin, Berger, and Meyers signed an Indemnity Agreement relating to the office equipment lease, which provided:

The partners of Walter J. Dowd, Inc. agree and covenant that each partner will share pro-rata equally in any liability that may come about as a result of [the office equipment] personal guaranty[]. Each partner agrees to reimburse and make whole the signatory up to their 25% share should the signatory incur any liability in connection with the agreement.

Meyers states that following the execution of the office lease agreements and the Indemnity Agreement, in or about February 2008, Charlop "abandoned" Down and left Colvin, Berger and Meyers with, among other things, the obligation due under the equipment lease. Meyers alleged that after Charlop left, Charlop ceased contributing any funds toward the office equipment lease agreements and that from February 2008 through June 2011, Colvin, Berger, and Meyers funded the capital so that Dowd could make the monthly payments due on the lease and that Dowd paid in excess of \$94,000 and Charlop made no contributions to these payments. Third party defendants make the argument that Charlop should be precluded fully from recovering any contribution to the monies he incurred to Fleetwood under the personal guaranty, or alternatively, that Charlop's third party Complaint should be dismissed to the extent that it seeks recovery of more than the sum of \$6,252.45 from each of them individually.

In opposition, Charlop submits an affidavit, stating that each of the third party defendants owe him 25% of his payment to Fleetwood- \$14,085.79, plus interest, in accordance with the Indemnity Agreement. Charlop contends the plain language of the Indemnification Agreement applies only to indemnification for funds expended under the personal guaranty, and was not intended to create an obligation for the parties to fund corporate expenses equally. Furthermore, Charlop contends that third party defendants have failed to provide sufficient evidence to support their allegations.

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are

not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-52 [1st Dept. 1989]).

“[W]hen parties set down their agreements in a clear, complete document, their writing should . . . be enforced according to its terms.” *Vermont Teddy Bear, Inc. v. 538 Madison Realty Co.*, 1 N.Y. 3d 470, 475 (2004) (citations omitted).

Third-party defendants Berger, Colvin, and Meyers fail to make a prima facie showing of entitlement to summary judgment and dismissal of the Third Party Complaint. Here, the Indemnity Agreement signed by the parties, provides that the parties would “share pro-rata equally in any liability that may come about as a result of [the office equipment] personal guarantee[]” and that each partner agreed “to reimburse and make whole the signatory up to their 25% share should the signatory incur any liability in connection with the agreement.” The plain language of the Indemnity Agreement does not address any other obligation of the shareholders.

Wherefore, it is hereby,

ORDERED that third party defendant DME Securities LLC’s motion for summary judgement is granted without opposition and the third party Complaint is dismissed as against third party defendant DME Securities, LLC, and the Clerk is directed to enter judgment accordingly, and it is further

ORDERED that third party defendants Michael Berger, John Colvin, and Warren Meyers’ motion for summary judgment is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

FILED

OCT 02 2013

Dated: 9/30/13

**NEW YORK
COUNTY CLERKS OFFICE**


EILEEN A. RAKOWER, J.S.C.