Salomone v Abramson
2016 NY Slip Op 31334(U)
July 15, 2016
Supreme Court, New York County
Docket Number: 602866/2008
Judge: Shirley Werner Kornreich

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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DANIEL SALOMONE,

Plaintiff,

-against-

Index No. 602866/2008

STEVEN ABRAMSON, JODI DENNIS, DIANE PLATEIS and CARMEN ARMOR,

DECISION & ORDER

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Plaintiff, Daniel Salomone moves (Motion Sequence 003) for partial summary judgment, pursuant to CPLR 3212, for an order that the indemnity obligations of remaining defendants,[1] pursuant to a cross-indemnification agreement, dated December 14, 2004 (Indemnification Agreement), include: 1) attorneys' fees that Salomone incurred in connection with his counterclaim for breach of his employment contract (Counterclaim) in an underlying action;[2] and 2) a pro rata share of the judgment on liability on the Counterclaim that Salomone gave up as part of a global settlement, that included the underlying action. Defendant Carmen Armor, a/k/a, Carmen Amor-Rios (Amor) opposes. Defendant Jodi Dennis defaulted on the motion.

In opposition to the motion, Amor raises the following points: 1) the Counterclaim was not covered by the Indemnification Agreement; 2) she did not agree to indemnify Salomone for his personal legal expenses; 3) the Indemnification Agreement was drafted by Salomone and should be construed against him; 4) the amount of damages Salomone gave up by discontinuing the Counterclaim is too speculative to support indemnification for it; and 5) Salomone cannot sue

[1] The action was discontinued by stipulation of all parties against defendants Steven Abramson and Diane Plateis. Dkt 178.

[2] The underlying action was *Current Medical Directions v Salomone*, Sup Ct NY Co, Index No. 600941/2006.

Amor on the Indemnification Agreement because it states incorrectly that Amor's percentage was 8.12%, but Salomone admitted in interrogatory responses that Amor's percentage was 4.9669%. The motion is denied for the reasons that follow.

Background

This action arises out of the 2004 sale, pursuant to an Asset Purchase Agreement (APA), of the assets of a medical education business called Current Medical Directions, Inc. (Company), a defined term in the APA. The Company was a wholly owned subsidiary of CMD Holding Corporation (CMD Holding). The parties to this action were defined in the APA as "Stockholders" as well as "Representors", and were all of the Stockholders of Holding. Salomone was CEO, President and the largest stockholder of Holding. The buyer, CMD Sudler Acquisition Co., LLC, defined in the APA as "Purchaser", later changed its name to Current Medical Directions, LLC (for convenience, this opinion will refer to it as Purchaser), the plaintiff in the underlying action. The Purchaser was a wholly-owned subsidiary of Sudler & Hennessey LLC, whose ultimate parent was WPP Group PLC.[3]

Salomone's complaint contains two causes of action: 1) breach of the Indemnification Agreement; and 2) a declaratory judgment that defendants were required to indemnify him for losses that arose out of or in connection with the underlying action. Dkt 1. The complaint does not explicitly mention the Counterclaim, although it mentions that the Purchaser fired Salomone. *Id.*

Article XII of the APA was entitled "SURVIVAL; INDEMNITY". Section 12.1 of Article XII provided that:

[3] Salomone's submissions refer to the Purchaser as WPP.

[* 3]

... each party hereto shall have the right to rely fully upon the representations, warranties, covenants and agreements of the other parties contained in this Agreement and the Schedules hereto, or in any document delivered at the Closing in connection with this Agreement. The respective representations, covenants, and agreements of the Company, the Representors and the Purchaser contained in this Agreement shall survive the Closing.

The relevant indemnification clauses in §12.2 of the APA provided as follows:

12.2.1. General Indemnity. The Company and Representors hereby agree, jointly and severally, to indemnify the Purchaser and its officers, directors, employees, agents, members, successors and affiliates (individually, a "Purchaser Indemnified Party" and collectively, the "Purchaser Indemnified Parties") against, and to protect, save and keep harmless the Purchaser Indemnified Parties from, and to assume liability for, the payment of all liabilities (including liability for Taxes), obligations, losses, damages, penalties, claims, actions, suits, judgments, settlements, out-of-pocket costs, expenses and disbursements (including reasonable costs of investigation, and reasonable attorneys', accountants' and expert witnesses' fees) of whatever kind and nature (collectively, "Losses"), that may be **imposed on or incurred by any Purchaser Indemnified Party as a direct result of or directly in connection with: (i) any misrepresentation, inaccuracy or breach of any representation or warranty contained in Article III.B** hereof; (ii) **any breach of or failure by the Company or any of the Representors to comply with or perform any agreement or covenant contained in this Agreement or in any other document, agreement or instrument executed in connection with the transactions contemplated hereby** (expressly excluding any breach or failure by the Stockholders to comply with or perform any obligation contained in the Employment Agreements and the Non-Competition Agreements); and (iii) **the assertion by any third party of any claim or cause of action relating to any Retained Liability**; (iv) **any litigation or claim disclosed on Schedule 3.10** of this Agreement; and (v) any **Taxes due and owing to the Company** (other than Taxes (other than income taxes) accrued for on the Closing Date Balance Sheet) or the Stockholders with respect to any period ending on or prior to the Closing Date. The term "Losses" as used herein is not limited to matters asserted by third parties against an Indemnified Party but includes losses incurred or sustained by an Indemnified Party in the absence of third party claims.

12.2.2. Special Indemnity. Each of the Representors hereby severally agrees to indemnify Purchaser Indemnified Parties

> against, and to protect, save and keep harmless the Purchaser Indemnified Parties from, and to assume liability for, the payment of all **Losses that may be imposed on or incurred by any Purchaser Indemnified Party as a direct result of or directly in connection with any misrepresentation, inaccuracy or breach of a representation or warranty contained in Article III.A** hereof.

[emphasis in bold added, underlined emphasis in original]

Contemporaneously with the APA, the Stockholders, including Salomone, entered into separate employment agreements with the Purchaser. The Stockholders' indemnification obligations in Article XII did not relate to Salomone's employment or his employment agreement.

Relevant portions of §13.15 of the APA appointed Salomone to act as "Representative" of the Stockholders with respect to **actions for indemnity** and empowered him:

> in such capacity **to act as ... the agent and true and lawful attorney-in-fact of each Stockholder** ... and with full capacity and authority in his sole discretion, **to act in the name of and for and on behalf of each Stockholder** in connection with all matters arising out of, resulting from, contemplated by or related or incident to this Agreement.... Without limiting the generality of the foregoing, the power of the Representative shall include the power, after receipt of the consent required pursuant to the Cross Indemnification Agreement among the Stockholders dated as of the date hereof, to represent each Representor with respect to all aspects of this Agreement, which power shall include, without limitation, the power to ... (iii) **bring, assert, defend, negotiate or settle any claims or actions for indemnity** pursuant to this Agreement, (iv) **retain legal counsel and be reimbursed by the Representors for all fees, expenses and other charges of such legal counsel** ....

[emphasis added in bold]

Section 1 of the Indemnification Agreement provided that:

> Notwithstanding the fact that the indemnification provisions set forth in Article XII of the [APA] ("Survival; Indemnity") and Section 2 hereof are "joint and several" obligations on the part of the Stockholders, as among the Stockholders, it is expressly agreed and understood that the individual liability of each of the Stockholders for any loss, claim, damage, liability or expense to which any of them may become subject **pursuant to Article XII of the [the APA] or pursuant to Section 2 hereof, shall be limited to his/her pro rata share of such liability** based on the following percentage ownership of CMD Holding immediately prior to the closing of the transaction contemplated by the [APA]: ....
>
> Amor 8.12% ....
>
> Thus, by way of example, should there be a claim **pursuant to Article XII of the [APA]** in the amount of $500,0000, and should Mr. Salomone incur $100,000 in expenses **defending against such a claim,** and should Mr. Salomone alone be required to pay such amounts as a result of the joint and severable nature of the obligation (an aggregate payment by Mr. Salomone of $600,000), based upon the percentage limitations, each of the Stockholders would be responsible as follows: ...
>
> Amor $48,720 ($600,000 x .0812) ....

[emphasis supplied in bold]

Section 2.2 of the Indemnification Agreement prohibited Salomone, in his capacity as Representative of the Stockholders, from taking action under APA §13.15(iii) and (iv) (except for strictly ministerial/administrative actions) without the prior written consent of the Stockholders, i.e., without prior written consent, Salomone could not bring, assert, defend, negotiate or settle any claims or **actions for indemnity, or be reimbursed for fees in connection therewith**, pursuant to APA §13.15 (iii) and (iv).

The Stockholders agreed in §2.3 of the Indemnification Agreement:

> to indemnify the Representative [Salomone] against and to protect, save and keep the Representative harmless from, and to assume liability for, the payment of all liabilities, obligations, losses,

> damages, penalties, claims, actions, suits, judgments, settlements, out-of-pocket costs, expenses and disbursements that may be imposed on or incurred by the Representative as a consequence, or as a result, of any action taken by the Representative **within the scope of his authority** ....

[emphasis added in bold]

On March 17, 2006, the Purchaser notified Salomone that it was seeking indemnification **for breaches of representations and warranties in Article III(B) of the APA**, as set forth in the underlying action complaint, which was attached to the notice. Dkt 157. The same day, the Purchaser sent Salomone a letter terminating his employment. Dkt 183.

On August 15, 2006, Salomone filed an answer in the underlying action in which he asserted the Counterclaim for breach of his employment agreement. Underlying Action, Dkt 19. In a decision entered in the underlying action on February 3, 2010, Salomone was granted summary judgment on the Counterclaim **on liability only**. Underlying Action, Dkt 93.

In May 2011, the Purchaser brought a second lawsuit against Salomone seeking a Working Capital Shortfall adjustment under the APA (Working Capital Action).[4] On October 5, 2010, Abramson's counsel, on behalf of all of the Stockholders except Amor, wrote a letter objecting to Salomone's insistence on proceeding with the Counterclaim, and putting him on notice that the expense going forward was on his shoulders. Dkt 26.

In July 2011, Salomone agreed to the entry of judgment against him for the amount sought in the Working Capital Action, approximately $8.5 million (Judgment). Collection efforts forced Salomone into bankruptcy. Salomone filed a Chapter 11 petition in March 2012.[5]

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[4] *Current Medical Directions v Salomone*, Sup Ct NY Co, Index No. 651464/2011.
[5] *In Re Daniel Salomone, Debtor*, EDNY Case No. 12-71740 (AST) (Bankruptcy).

Salomone says he entered a global settlement in the Bankruptcy that included the underlying action and Working Capital Action. He submits an unsigned settlement agreement, which states that he agreed to pay $250,000 and discontinue the Counterclaim with prejudice. Dkt 105. By stipulation filed on July 19, 2013, the Purchaser and Salomone discontinued the underlying action and the Counterclaim with prejudice. Underlying Action, Dkt 230.

Discussion

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a prima facie showing requires denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). Upon the completion of the court's examination of all of the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

A contract assuming an obligation to indemnify "must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." *Hooper Associates, Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 (1989).

> Inasmuch as a promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney's fees, **the court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise.**

Id, at 492 [emphasis supplied]; *see also*, *Awards.Com, LLC v Kinko's, Inc.*, 84AD3d 639, 640 (1st Dept 2011) (strictly construing indemnification agreement to prosecuting counterclaim but not defending against main claims).

Salomone's motion for summary judgment is denied because it is not "unmistakably clear" that the Indemnification Agreement covered attorneys' fees and costs for prosecuting Salomone's Counterclaim against the Purchaser for breach of his employment contract. In fact, the opposite is true. Article XII of the APA required indemnification **of the Purchaser** for breaches by the Stockholders. It did not require the Stockholders to indemnify Salomone for the Purchaser's breach of the related agreements, including Salomone's employment contract, the subject of the Counterclaim. Section 13.15 of the APA appointed Salomone as Representative of the Stockholders and permitted him to recover fees from them with respect to **actions for indemnity, i.e. by the Purchaser**. The Indemnification Agreement provided that the Stockholders would indemnify Salomone and reimburse him for expenses with respect to claims **pursuant to Article XII of the APA or pursuant to §2 of the Indemnification Agreement.** Section 2.3 of the Indemnity Agreement limited the Stockholders' obligation to indemnify Salomone and reimburse him for fees to actions he took within the **scope of his authority**, i.e., with respect to indemnity actions by the Purchaser.

Thus, the Indemnity Agreement did not entitle Salomone to be reimbursed or indemnified for expenses in connection with his Counterclaim. Salomone argues that it was a "defensive counterclaim" and involved a question of fact also raised by the Purchaser in the underlying

action.[6] However, nothing in Article XII or §2 required the Stockholders to indemnify Salomone for personal claims that he asserted as a defensive tactic or that had facts in common with an indemnity claim by the Purchaser. To add that gloss would not be a strict construction of the language of the Indemnification Agreement.[7] As Salomone is not entitled to be indemnified or reimbursed for the Counterclaim, he is not entitled to credit for giving it up. It is unnecessary to consider Amor's arguments concerning the drafting of the agreement, her consent, and whether the amount of damages Salomone gave up on the Counterclaim is speculative.

However, the court rejects Amor's argument that the Indemnification Agreement is unenforceable because of a potential error as to her percentage. While a mutual mistake might be grounds for reformation, a reformation claim was not raised in Amor's answer [Dkt 185] or on this motion. *See*, *George Backer Management Corp. v Acme Quilting Co.*, 46 NY2d 211, 219 (1978) (reformation is equitable remedy for agreement entered into by fraud or mutual mistake but requires very high order of proof). Salomone's responses to Amor's interrogatories admitted that Amor's percentage of the Company prior to the sale was 4.9669% and that Salomone was seeking that percentage of indemnification from her. Dkt 184.

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[6] Salomone was terminated by the Purchaser allegedly based on deficient 2005 OPAT, operating profit after taxes, compared to 3 prior years, which was the basis for some of the Purchaser's claims in the underlying action.

[7] *Jenel Mgt. Corp. v Pacific Ins. Co.*, 55 AD3d 313 (1st Dept 2008) and *Perchinsky v State*, 232 AD2d 34 (3d Dept 1997), cited by Salomone, are distinguishable. They stand for the proposition that indemnitees, who were entitled to indemnification on the main claim, also were entitled to indemnification for third-party actions seeking a claim over for any judgment obtained on the main claims. The courts reasoned that the third-party actions were an essential component of the defense of the main actions, which were covered by the indemnification contracts. However, Salomone's Counterclaim was not the pursuit of a third-party liable for the Purchaser's claim. Nor was it covered by the Indemnification Agreement.

With respect to Dennis, the motion is denied, despite her default, because Salomone failed to make a prima facie showing that he was entitled to summary judgment as a matter of law. *Ayotte v Gervasio, supra.* Accordingly, it is

ORDERED that the motion (Sequence 003) by plaintiff Daniel Salomone for partial summary judgment is denied as to defendants Carmen Amor a/k/a Carmen Amor-Rios and Jodi Dennis, and is denied as moot with respect to defendants Steven Abramson and Diane Plateis.

Dated: July 15, 2016

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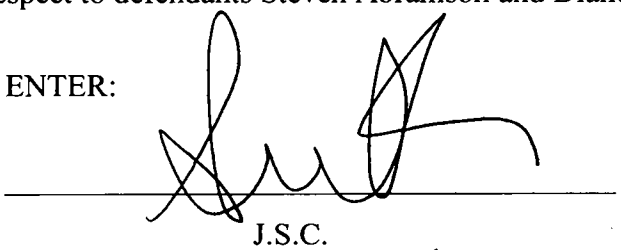

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.