485 Shur LLC v Lightstone Acquisitions III LLC
2018 NY Slip Op 30015(U)
January 3, 2018
Supreme Court, New York County
Docket Number: 651916/2016
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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485 SHUR LLC,

Plaintiff,

- against -

LIGHTSTONE ACQUISITIONS III LLC, and
485 SEVENTH AVENUE ASSOCIATES LLC,

Defendants.

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Index Number: 651916/2016

Motion Seq. No.: 001

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 and 2, were used on defendants' motion to dismiss the complaint:

	Papers Numbered:
Notice of Motion – Affirmation – Exhibits (memorandum of law)	1
Affidavit in Opposition – Exhibits (memorandum of law)	2
Reply Memorandum of Law In Further Support of Motion to Dismiss (memorandum of law only)	

Upon the foregoing papers, defendants' motion to dismiss the complaint is granted.

Background

Plaintiff, 485 Shur LLC ("Shur"), owned a sixteen story commercial building ("the Building") and employed union workers from Local 32BJ, Service Employees International Union ("the Union"), to operate and maintain it. Pursuant to an agreement with the Union, plaintiff contributed to the 32BJ Pension Fund ("the Pension Fund"). In 2014, plaintiff sold the Building to defendants Lightstone Acquisitions III LLC ("LA") and 485 Seventh Avenue Associates LLC ("485") (collectively, "LA/485").

In this action, Shur seeks indemnification from LA/485 for a "Withdrawal Liability" assessed against Shur by the Pension Fund pursuant to the Employment Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), due to Shur's sale of its Building to LA/485. LA/485 contend that the contract documents that governed the sale do not obligate them to indemnify Shur for the Withdrawal Liability, which they contend is an obligation imposed solely by operation of law and not by reason of their alleged breach of contract.

The parties agree on the following core facts. Pursuant to a union contract between Shur and the Union ("the Union Contract," also referred to by the parties as the "Employment Agreements"), Shur contributed various sums to the Union's Pension Fund. Pursuant to an Agreement of Purchase and Sale ("the Agreement"), an Assignment and Assumption of Union Contract ("the Assumption"), and a General Assignment and Assumption Agreement ("the Assignment") (collectively, "the Contract Documents"), Shur agreed to sell its Building to LA for the sum of $182,000,000.00. LA then transferred its interest in the Agreement, the Assumption, and the Assignment, to 485. On November 19, 2014, the parties closed on the sale of the Building to 485 (or LA/485).

The Contract Documents require LA/485 to assume Shur's obligations to the Building's union employees under the Union Contract. The Agreement, at Paragraph 13, provides in pertinent part as follows:

(d) Purchaser understands and agrees that it is acquiring the Property subject to union agreements (the "Employment Agreements") covering union personnel who are engaged in the operation or maintenance of the Property (collectively, the "Employees") and that an entity pays to or on behalf of Employees all wages, vacation pay, social security taxes, workers' compensation, pension and other fringe benefits. Purchaser covenants and agrees to assume the obligations of a building owner or employer under, and comply in all material respects with, the Employment Agreements and, subject to, and in accordance with, terms of the Employment Agreements, employ the Employees at the Building or as otherwise permitted in the Employment Agreements. Purchaser shall indemnify and hold Seller and Sellers' affiliates harmless from any loss, damages, cost (including without limitation, reasonable attorneys' fees and expenses, and any claims of severance arising from or relating to the transactions contemplated hereby) as a result of Purchaser's breach of any or all of the Employment Agreements or termination of the employment of Employees [emphasis added];

The Assumption provides *inter alia*:

> In consideration of Ten ($10.00) Dollars and other good and valuable consideration in hand paid by Assignee, the receipt and sufficiency of which is hereby acknowledged, Assignor hereby assigns unto the Assignee all of Assignor's right, title and interest in and to the following:
>
> The 2012 Independent Office Agreement Between Local 32BJ, Service Employees International Union effective January 1, 2012 to December 31, 2015 covering the Union Employees, and made a part hereof (the "Union Contract") applicable to the premises located at 485 7th Avenue, New York (the "Property").
>
> Assignee hereby assumes all of the obligations imposed upon Assignor under the Union Contract accruing from and after the date hereof. . . .

The Assignment provides *inter alia*:

> . . . For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Assignor hereby assigns to Assignee all of Assignor's right, title and interest in, to and under (i) the leases, license agreements and other occupancy agreements listed on Exhibit A attached hereto.

By letter dated February 19, 2015, the Fund notified Shur of its determination that Shur had withdrawn from participation in the Fund by virtue of the sale of its assets, and assessed a Withdrawal Liability against Shur in the sum of $272,543.00. Shur failed to request review of the Pension Fund's determination (as it was entitled to do under MPPAA) and did not pay the Withdrawal Liability; consequently, the sum became fixed. By letter dated April 2, 2015, Shur demanded indemnification for the Withdrawal Liability from LA/485 pursuant to the Contract Documents. By letter dated May 4, 2015, LA/485 declined the demand, upon the ground that it is not obligated to indemnify Shur because

the Withdrawal Liability is being assessed "solely as a result of the operative provisions of [ERISA], as amended and not due to any action or inaction" on the part of LA/485. The Pension Fund sued Shur in the United States District Court, Southern District of New York, to recover "unpaid withdrawal liability, liquidated damages, interest, attorneys' fees, and costs within the meaning of Title VII of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), Section 4001 et seq., 29 U.S.C. § 1301 et seq." Neither LA nor 485 were named as direct or third-party defendants in the federal lawsuit. On February 5, 2016, Shur settled the Fund's lawsuit for the total sum of $272,543.00, the Fund having waived penalties, interest, liquidated damages, and attorney's fees.

The Complaint

The complaint, filed on April 11, 2016, consists of seventeen pages, the first twelve of which set forth the indemnification provisions in the Agreement; Shur's "Withdrawal Liability" to the Plan; the Plan's federal lawsuit against Shur to recover the "Withdrawal Liability"; Shur's demand for indemnification from LA/485, and LA/485's statement that it would not indemnify Shur. The last five pages of the complaint assert three causes of action: breach of the Agreement (first cause of action); breach of the Assumption (second cause of action); and breach of the Assignment (third cause of action), and seeks a judgment against defendants in the sum of $272,543.00, representing the amount assessed against and paid by Shur.

Defendants now move, pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint upon the ground that Shur's Withdrawal Liability was imposed by law under ERISA and MPPAA and not as a result of any breach of the Contract Documents by LA/485, and the Contract Documents otherwise do not obligate LA/485 to indemnify Shur for the Withdrawal Liability. LA/485 also move for an award of attorney's fees and expenses incurred herein upon the ground they are/will be the "prevailing parties" in this breach of contract action pursuant to the terms of the Agreement.

Shur opposes the motion upon the grounds that: (1) ERISA and the MPPAA do not shield LA/485 from their contractual obligation to indemnify Shur; (2) LA/485 agreed, in the Contract Documents, to assume all of Shur's liabilities under the Union Contract, and the Withdrawal Liability arises out of the Union Contract; and (3) Shur incurred the Withdrawal Liability after the closing on the sale of the Building, thus triggering LA/485's obligation to indemnify Shur. Shur opposes LA/485's request for attorney's fees and expenses upon the ground that Shur will be the prevailing party.

Governing Law

First, a word on well-settled procedure. Dismissal of a complaint pursuant to CPLR 3211(a)(1) is warranted where the documentary evidence submitted conclusively establishes as a matter of law a defense to the asserted claims. Leon v Martinez, 84 NY2d 83, 88 (1994); accord; Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc., 112 AD3d 78, 82-83 (1st Dept 2013) ("[d]ismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law"). Dismissal of a complaint pursuant to CPLR 3211(a)(7) is only warranted where, after accepting the facts alleged as true and according plaintiff the benefit of every possible favorable inference, the court determines that the allegations do not fit within any cognizable legal theory. Leon v Martinez, supra, 84 NY2d at 87-88; Morone v Morone, 50 NY2d 481, 484 (1989). The court's inquiry is limited to whether plaintiff has stated a cause of action and not whether it may ultimately be successful on the merits. Stukuls v State of New York, 42 NY2d 272, 275 (1977); EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005) ("[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus" in determining a motion to dismiss for failure to state a cause of action). A complaint survives a motion to dismiss for failure to state a cause of action if it gives the court and the parties "notice" of what is intended to be proved and the material elements of a cause of action. CPLR 3013; see Rogers v Earl, 249 AD2d 990 (4th Dept 1998).

Next, a word on ERISA, as amended by the MPPAA, one of the lenses through which the Court must view the complaint. Congress enacted ERISA, pursuant to which employee benefit plans are regulated

and administered, to ensure that such plans are sound and stable "with respect to adequate funds to pay promised benefits." 29 USCA § 1001(a) ("...it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness."); see also Jaspan v Certified Indus., Inc., 645 F Supp 998, 1004 (EDNY 1985) ("The primary purpose of the legislation is to protect retirees and workers who are participants in such plans against loss of their pensions ...Employer withdrawal liability will help to insulate a plan from the adverse effects of a sustained decline in the contribution base.").

In 1980, Congress passed the MPPAA, which modified and extended ERISA coverage by allowing "collective bargaining agreements for employers in large, fragmented industries like construction to collect employer contributions for a single centralized industrywide pension fund [also known as a multiemployer plan], rather than for individual plans for each employer." Stevens Engineers & Constructors, Inc. v Local 17 Iron Workers Pension Fund, No. 16-4098, __F3d__ (6th Cir. 2017 [2017 WL 6347716, at *1]) (citing 29 USC § 1301[a][3], defining multiemployer plan). In order to avoid the under-funding of a multiemployer plan caused by employers leaving such plan – such as by the employer's sale of its assets – the MPPAA contains a provision that imposes a withdrawal liability "pursuant to which an employer leaving an industry or a plan would be responsible for paying additional contributions to that plan at the time of their exit." Id.; 29 USCA § 1381(a) ("If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.").

However, the MPPAA permits an employer to avoid withdrawal liability otherwise imposed upon the sale of its assets where the sale "meets certain requirements, all of which are designed to shift the obligation for benefit contributions to the purchaser while leaving the seller secondarily liable for a five-year period after the sale." Cent. States, Se. & Sw. Areas Pension Fund v Bell Transit Co., 22 F3d 706, 711-712 (7th Cir. 1994) (quoting Cent. States, Se. & Sw. Areas Health and Welfare Fund v Cullum Companies, Inc., 973 F2d 1333, 1337 [7th Cir. 1992]). Thus, pursuant to 29 USCA 1384(a)(1), a "bona fide, arm's length sale of assets to an unrelated party" does not trigger an employer's withdrawal liability where:

> (a) the purchaser is obligated to contribute to the plan "for substantially the same number of contribution base units for which the seller had an obligation to contribute to the plan";
>
> (b) the purchaser provides a bond in an amount equal to the greater of the seller's "average annual contribution" to the plan for 3 plan years prior to sale or the seller's "annual contribution" to the plan for the year prior to the sale; and
>
> (c) the sales contract provides that, if the purchaser completely or partially withdraws from the plan during the "first 5 plan years, the seller is secondarily liable for any withdrawal liability."

"Once the seller has complied with the requirements of section (a)(1) at the time of the sale, the seller is within § 1384(a)'s safe harbor and the plan must pursue any subsequent violations using the remedies provided in the statute: first, the assessment of withdrawal liability against the purchaser, and then, if that fails, the plan may collect the purchaser's bond posted in accordance with section (a)(1)(B) or seek to collect from the seller based on the seller's secondary liability." Cent. States, Se. & Sw. Areas Pension Fund v Bell Transit Co., supra 22 F3d at 712.

Finally, a brief word on black-letter contract law, which is the other lense through which the instant complaint must be viewed. It is well-settled that agreements to indemnify are strictly construed, particularly where the indemnitor is "under no legal duty to indemnify." Hooper Assocs., Ltd. v AGS

Computers, Inc., 74 NY2d 487, 491–92 (1989) ("When 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. The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances.") (internal citations omitted).

Discussion

In view of the foregoing, the Court is constrained to reach but one conclusion: the documentary evidence – i.e., the clear and unambiguous terms of the Contract Documents, and the complaint in the federal action – establish an absolute defense to Shur's claims to recover its Withdrawal Liability from LA/485. At the outset, contrary to Shur's contention, its Withdrawal Liability arose solely by operation of law upon the sale of its Building, and not as a result of LA/485's purported breach of the Contract Documents by way of a purported breach of the Union Contract, or termination of any union employees, or otherwise. The documentary evidence completely refutes any allegation of breach by LA/485: the Pension Fund's complaint in the federal action sought recovery of Shur's "unpaid withdrawal liability…within the meaning of Title VII of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), Section 4001 et seq., 29 U.S.C. §1301 et seq.," as a result of Shur's sale of its Building. Neither LA nor 485 were named as direct defendants in the federal action, and Shur did not implead them therein in tacit if not explicit recognition that it had no claim over against LA/485 upon any ground. Indeed, there is no proof that LA/485 failed in their obligations to the Fund and the Plan, or terminated the Building's union employees, or otherwise breached the Contract Documents.

Moreover, Shur is not entitled to a "safe harbor" from Withdrawal Liability upon the sale of its Building because the Agreement does not comply with 29 USCA § 1384(a). The Agreement did not require LA/485 to contribute to the Plan "substantially the same number of contribution base units for which [Shur] had an obligation to contribute," and the mere fact that LA/485 agreed to undertake Shur's obligations under the Union Contract is not enough. See HOP Energy, L.L.C. v Local 553 Pension Fund, 678 F3d 158, 162 (2d Cir. 2012) (employer sale of business did not comply with 29 USCA 1384 because under sale agreement purchaser "had no 'obligation to contribute' substantially the same number of hours of pay as [employer] had contributed pre-sale."; rejecting seller's argument that purchaser "had the requisite contribution obligation because [it] simply 'stepped into HOP's shoes.'"). The Agreement did not require LA/485 to procure a bond in an amount equal to Shur's "average annual contribution," and, indeed, LA/485 did not procure any such bond. See Jaspan v Certified Indus., Inc., supra. The Agreement also did not provide that, if LA/485 completely or partially withdraws from the Plan during the first 5 plan years following the purchase of the Building, Shur is "secondarily liable for any withdrawal liability it would have had to the plan … if the liability of the purchaser with respect to the plan is not paid." See Jaspan v Certified Indus., Inc., supra. Had Shur wanted to transfer or "pass off" its Withdrawal Liability to LA/485, and remain only secondarily liable for LA/485's Withdrawal Liability if LA/485 withdrew from the Plan, it could have done so in accordance with the clear and precise manner set forth in the statute. It did not.

The Court of Appeals for the Third and Sixth Circuits have held that an employer can be indemnified for its Withdrawal Liability, specifically, or for its obligations under ERISA and MPPAA, generally, provided the agreement containing the indemnification expressly so states and the employer's statutory obligations are not diminished; in other words, an employer can be indemnified for its Withdrawal Liability so long as it remains financially liable to the pension fund and it satisfies such financial obligation. See Pittsburgh Mack Sales & Serv., Inc. v Int'l Union of Operating Engineers, Local Union No. 66, 580 F3d 185, 194 (3d Cir. 2009) ("We hold that there are not enough 'definite indications' of public policy in ERISA or the MPPAA to preclude an indemnification agreement between an employer

and a third party for the employer's withdrawal liability, where the employer agrees that it will always remain primarily liable for the liability."); Shelter Distribution, Inc. v General Drivers, Warehousemen & Helpers Local Union No. 89, 674 F3d 608 (6th Circuit 2012) (same). (The Court of Appeals for the Second Circuit has not passed upon this precise issue). Here, however, construing the subject indemnification provisions strictly, as this Court must do, they do not clearly, expressly, and unambiguously require LA/485 to indemnify Shur for Withdrawal Liability or for obligations imposed upon it by ERISA and MPPAA. The phrase "Withdrawal Liability" does not appear anywhere in the indemnification provisions. The indemnification provisions do not contain any language that LA/485 must indemnify Shur for liabilities imposed upon it by ERISA or MPAA. The indemnification provisions state only that LA/485 "agrees to assume" Shur's obligations under the Union Contract and "to indemnify and hold [Shur] harmless" from losses and damages resulting from LA/485's breach thereof or termination of union employees. Shur's arguments that the parties' intended that LA/485 indemnify Shur for its Withdrawal Liability because LA/485 effectively stepped into Shur's shoes by assuming its obligations under the Union Contract, does not carry the day, as the language of the indemnification provision fails to evince "an unmistakable intention" to so indemnify. See Heimbach v Metro. Transp. Auth., 75 NY2d 387, 392 (1990) ("had there been such an agreement, the contractual language would have to have evinced an 'unmistakable intention' to indemnify before a court would enforce such an obligation.").

Thus, because LA/485's obligation to indemnify Shur is triggered only by a breach of the Contract Documents, and the documentary evidence establishes that Shur's Withdrawal Liability was imposed by operation of law and not by reason of any breach on the part of LA/485, there is no legal or factual basis for Shur's claims and the complaint must be dismissed as the documentary evidence "conclusively establishes a defense to the asserted claims as a matter of law." Leon v Martinez, 84 NY2d at 88.

As LA/485 is the "prevailing party" in this action that Shur commenced to "enforce its rights" under the Agreement and to "collect damages" as a result of LA/485's alleged breach of the Contract Documents, under paragraph 17 of the Agreement, LA/485 is "entitled to recover all reasonable costs and expenses, including, without limitation, reasonable attorneys' fees and court costs actually incurred." Accordingly, LA/485 is entitled to a hearing before a Special Referee to fix such amounts.

The Court has considered the parties' other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Defendants' motion to dismiss the complaint is granted. The Clerk is hereby directed to enter judgment dismissing the complaint. This matter is referred to a Special Referee for a hearing on the amount of reasonable attorneys' fees and costs actually incurred by defendants in this action, conditional upon defendants' submitting to the Special Referee Clerk an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein.

Dated: January 3, 2018

Arthur F. Engoron, J.S.C.