PPR Media LLC v Leo Cable LP
2019 NY Slip Op 30472(U)
February 25, 2019
Supreme Court, New York County
Docket Number: 651443/2018
Judge: Barry Ostrager

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 61 IAS MOTION

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PPR MEDIA LLC,

Plaintiff,

- v -

LEO CABLE LP and LCPR CAYMAN HOLDING INC.

Defendants.

INDEX NO. 651443/2018

MOTION DATE Feb. 19, 2019

MOTION SEQ. NO. 003 & 004

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 69
were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 66, 67, 68
were read on this motion to/for SUMMARY JUDGMENT.

HON. BARRY R. OSTRAGER:

This action arises out of a dispute regarding the release of escrow funds. Plaintiff PPR Media LLC ("PPR") moves for summary judgment on its single cause of action seeking, *inter alia*, a declaration ordering release of the escrow funds. Defendants Leo Cable LP ("Leo") and LCPR Cayman Holding Company Inc. ("LCPR") also move for summary judgment dismissing PPR's single cause of action.

The issue presented is one of contract interpretation that must be decided as a matter of law. Most, if not all, facts are undisputed and have been stipulated to by the parties. The Court will briefly summarize those facts before analyzing the pertinent contractual language. For the reasons stated below, Plaintiff's motion for summary judgment is granted.

Background

Prior to June 3, 2015, Plaintiff PPR owned all the issued and outstanding shares of stock of Puerto Rico Cable Holding Company Inc. ("Holding"), a Puerto Rico corporation that in turn owned all the issued and outstanding shares of Puerto Rico Cable Acquisition Company ("Choice"). Defendants, directly and through affiliated entities, own Liberty Cablevision of Puerto Rico LLC ("Liberty"). Liberty and Choice were, and are currently, in the business of owning and operating cable and fiber optic broadband networks for customers in Puerto Rico.

On December 9, 2014, the parties entered into a Stock Purchase Agreement ("SPA"). Pursuant to the SPA, LCPR would acquire all the shares of Holding—and therefore own Choice—as of the June 3, 2015 closing date.

Concurrent with the execution of the SPA, PPR, LCPR, and non-party Wells Fargo also executed a separate Indemnification Escrow Agreement under which $15 million was deposited into an escrow account to serve as indemnification escrow funds for potential breaches of the SPA. The escrow funds can only be released by the escrow agent pursuant to either a joint written instruction by PPR and LCPR, or by a final, non-appealable order of a court of competent jurisdiction.

The general purpose of the indemnification escrow funds is to reimburse non-breaching parties for potential breaches of the SPA that may arise during a limited period following execution of the SPA. Thus, $15 million was set aside in escrow to cover the losses a party may incur because of a breach of the SPA and the associated costs of litigating that dispute. The indemnification funds would cover direct disputes between parties to the SPA for breach of the

SPA, as well as proceedings brought by third parties that stem from an underlying breach of the SPA.

The SPA provides that an indemnified party could make claims against the indemnification escrow funds no later than June 30, 2016. Such claims would provide notice of the breach and an estimate of the potential losses stemming from that breach. The amount of the estimated loss would be set aside from the $15 million escrow fund as reserve funds until the claim is finally resolved. For example, if a party made a claim for an estimated $5 million in losses stemming from a breach of the SPA, $5 million of the $15 million in escrow would be set aside as reserve funds. Any funds not designated as reserve funds would seemingly be released from escrow after the June 30, 2016 claim deadline. Thus, any potential claim for indemnification funds would have to be noticed on or before June 30, 2016. Presumably, if no claims were made by June 30, 2016, or if all claims made on or before June 30, 2016 were resolved, the remaining escrow funds would be disbursed in their entirety.

On December 3, 2015, PPR and LCPR jointly instructed the escrow agent to release roughly $7.5 million from the indemnification funds. It appears that at such time no claims had been made against the indemnification escrow fund. The SPA provided that six months after the SPA closing date, half the unreserved escrow funds would be released to the seller. Because no claims had been made against the $15 million escrow fund, half of the $15 million in escrow was released as instructed.

On January 15, 2016, a class action lawsuit was filed in San Juan, Puerto Rico (the "Castillo Action"). The putative class action alleged that paper-billing fees charged by Choice and Liberty violated various Puerto Rican and federal laws.

On February 8, 2016, Defendants sent a letter to Plaintiff under Section 10.06 of the SPA attaching a copy of the complaint in the Castillo Action and asserting that Plaintiff may be obligated to indemnify Defendants for losses arising from the class action.

On March 9, 2016, Plaintiff sent a letter to Defendants providing notice that PPR was electing to assume the defense of Choice in connection with the Castillo Action, but that Plaintiff otherwise expressly reserved its rights to disclaim any indemnification obligation.

On June 23, 2016, Defendants sent a Claim Notice to Plaintiff under Section 10.01 of the SPA related to the claims asserted in the Castillo Action. It is undisputed that the June 23, 2016 Claim Notice was timely because it was sent prior to the June 30, 2016 Applicable Claims Deadline provided in the SPA. The June 23, 2016 Claim Notice provides:

> [T]his letter constitutes a Claim Notice with respect to [the Castillo Action], with respect to which Seller may be obligated to provide indemnification under Section 10.02(a) of the [SPA] based on a possible breach of Section 6.15(a) of the [SPA], in the amount of at least $17,043,838.... Because this amount represents an unresolved claim for indemnification, it will therefore constitute "Reserved Funds" under the [SPA] and will not be released from the Indemnification Escrow Funds under Section 10.07 of the [SPA] until such claim is resolved. (Claim Notice [NYSCEF Doc. No. 33]).

On August 9, 2017, plaintiffs in the putative class action voluntarily dismissed the Castillo Action without prejudice. On August 10, 2017, two of the named plaintiffs from the Castillo Action, along with several new named plaintiffs, filed a putative class action lawsuit (the "Centro Otologico Action"), in a different Puerto Rican forum, alleging essentially the same claims as alleged in the Castillo Action. Plaintiffs in the Centro Otologico Action are represented by the same counsel that represented plaintiffs in the Castillo Action.

None of the parties were aware of the Centro Otologico Action for several months until counsel for Liberty and Choice were notified by counsel for plaintiffs in that class action that a motion for default had been filed against both Liberty and Choice.

On December 29, 2017, Defendants sent a letter to PPR under Section 10.06 of the SPA attaching a copy of the complaint in the Centro Otologico Action and asserting that PPR may be obligated to indemnify Defendants under Section 10.02(a) of the SPA. The letter also noted that the new class action was an "offshoot" of the original Castillo Action that had been dismissed without prejudice. (December 29, 2017 Letter [NYSCEF Doc. No. 40]).

On January 18, 2018, PPR sent a letter to Defendants asserting, *inter alia*, that because the Centro Otologico Action had been filed after the SPA's June 30, 2016 Applicable Claims Deadline, PPR had no indemnification obligations and was not assuming the defense of the Centro Otologico Action. The letter further demanded that the remaining indemnification escrow funds be released. (January 18, 2018 Letter [NYSCEF Doc. No. 41]).

PPR commenced this action seeking a declaration ordering Defendants to release the remaining indemnification escrow funds. The parties filed competing motions for summary judgment.

Legal Standard

On a motion for summary judgment, the movant bears the initial burden to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Id.* "Normally, if the facts are uncontested,

summary judgment is appropriate." *Andre v. Pomeroy*, 35 N.Y.2d 361, 364 (1974). Here, the parties have stipulated to all the material facts necessary to determine the issues in the action as a matter of law.

"Under New York law, written agreements are construed in accordance with the parties' intent and the best evidence of what parties to a written agreement intend is what they say in their writing." *Schron v. Troutman Sanders LLP*, 20 N.Y.3d 430, 436 (2013) (internal quotations and citations omitted). "The question whether a writing is ambiguous is one of law to be resolved by the courts." *Wallace v. 600 Partners Co.*, 86 N.Y.2d 543, 548 (1995). However, "[u]nless the court finds ambiguity, the rules governing the interpretation of ambiguous contracts do not come into play." *R/S Associates v. New York Job Development Authority*, 98 N.Y.2d 29, 33 (2002).

Discussion

PPR contends that the SPA unambiguously limits PPR's indemnification obligation to claims brought before the June 30, 2016 Applicable Claims Deadline, and thus, PPR has no indemnification obligation with respect to the Centro Otologico Action which was not filed until after the Applicable Claims Deadline. Therefore, any Claim Notice based on the Centro Otologico Action is necessarily time-barred.

PPR essentially asserts that its indemnification obligations ceased when the Castillo Action was voluntarily dismissed, without prejudice, on August 9, 2017, and that it is of no significance that a nearly identical putative class action was commenced the following day. In PPR's view, the Centro Otologico Action was a separate but admittedly related action that required Defendants to send a separate Claim Notice under the SPA, which necessarily could not have been sent by the June 30, 2016 Applicable Claims Deadline.

The overarching premise of PPR's argument appears to be that a Claim Notice is intended to provide notice of a specific *lawsuit* commenced by either a third-party or a party to the SPA.

The Defendants, on the other hand, view the June 23, 2016 Claim Notice as providing PPR with notice of underlying breaches of the SPA's representations and warranties, and assert that the Castillo Action merely brought attention to those underlying breaches. The Claim Notice explicitly mentions a "possible breach of Section 6.15(a)" of the SPA, which broadly warrants that the contracting companies are in compliance with all applicable laws and regulations. (*See* Stock Purchase Agreement [NYSCEF Doc. No. 28]).

Thus, the premise of Defendants' argument appears to be that the June 23, 2016 Claim Notice provided PPR with notice not only of the Castillo Action but of underlying breaches of Section 6.15(a) of the SPA. Thus, any subsequent lawsuit related to potential breaches of the SPA based upon allegations of unlawful paper-billing practices would necessarily be covered by the June 23, 2016 Claim Notice and would not warrant an additional Claim Notice. Based on this interpretation of the SPA, the Centro Otologico Action would be covered by the June 23, 2016 Claim Notice because, as Defendants assert, indemnification claims are based upon breaches of representations and warranties in the SPA, not specific lawsuits.

Therefore, the two issues the Court must address are: (1) whether a Claim Notice under the SPA must be based upon a specific lawsuit, as opposed to a general allegation of a breached warranty or representation; and (2) whether the voluntary dismissal, without prejudice, of the Castillo Action finally resolved the claims specified in the June 23, 2016 Claim Notice.

First, a Claim Notice under the SPA must relate to both a breach of the SPA *and*, by the SPA's own definitions, a lawsuit or other formal proceeding.

Section 10.01(c) defines "Claim Notice" as "any claims asserted in good faith with reasonable specificity (to the extent known at such time) and in writing by notice from the Indemnified Party to the Indemnifying Party prior to the Applicable Claims Deadline and otherwise **in conformity with the requirements set forth in Sections 10.06** and 12.02." (Stock Purchase Agreement [NYSCEF Doc. No. 28]) (emphasis added).[1]

Section 10.06, entitled "Indemnification Procedures", provides procedures for three types of Claim Notices: Third Party Claims, Direct Claims, and Tax Claims. *See id.* at 10.06(a)-(d).

Third Party Claims are defined as "notice of the assertion or commencement of any **Action** made or brought by" a non-contracting party under the SPA, such as a class of consumers. *Id.* at 10.06(a) (emphasis added).

"Action" is defined as "any claim, action, demand, lawsuit, arbitration, inquiry, audit, notice of violation, proceeding, litigation, citation, summons or subpoena of any nature, whether civil, criminal, administrative, regulatory, or otherwise, whether at law or in equity, **pending before or issued by any Governmental Authority**." *Id.* at Article I (emphasis added).

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[1] Section 12.02 merely provides administrative requirements for how written notices and claims must be provided:

> All notices, requests, consents, claims, demands, waivers and other communications hereunder shall be in writing and shall be deemed to have been given, delivered, received or made (a) when delivered by hand (with written confirmation of receipt); (b) when received or delivery is refused by the addressee if sent by a nationally recognized overnight courier (receipt requested); (c) when sent by facsimile or e-mail of a PDF document (with confirmation of transmission) if sent during normal business hours of the recipient, and one the next Business Day if sent after normal business hours of the recipient or (d) when received or delivery is refused, by certified or registered mail, return receipt requested, postage prepaid. Such communications must be sent to the respective parties at the following addresses….

"Governmental Authority" is broadly defined to include any federal, state, local or foreign governmental entity, including regulatory agencies and courts of competent jurisdiction. *See id.*

Together, these provisions indicate that a Third Party Claim is written notice of a formal proceeding—such as a private lawsuit or an administrative inquiry that is pending before a court or other governmental entity—that may potentially create an indemnity obligation based upon an underlying breach of a provision in the SPA. Indeed, all three types of claims (Third Party, Direct, and Tax) are tied, by the SPA's own defined terms, to the existence of a pending, formal proceeding, such as a pending lawsuit.[2] That the SPA would define Claim Notices as concerning specific, pending formal proceedings makes practical sense: an indemnification obligation could only arise from a loss, which necessarily must result from a lawsuit, administrative proceeding, audit, regulatory inquiry, arbitration, subpoena, or some other formal proceeding "pending before or issued by any Governmental Authority." *Id.* at Article I.

Defendants' interpretation of the SPA fails to consider that a Claim Notice of a Third Party Action must, by the SPA's definition of "Action", be tied to a formal, pending proceeding before a governmental body, such as a court. Defendants' interpretation would read out of the SPA the definition of "Action." However, "courts are obliged to interpret a contract so as to give meaning to all of its terms." *U.S. Bank Nat. Ass'n v. Lightstone Holdings LLC*, 103 A.D.3d 458,

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[2] Direct Claims are similarly defined as any "Action by an Indemnified Party on account of a Loss which does not result from a Third Party Claim." SPA § 10.06(c). Thus, Direct Claims are identical to Third Party Claims in all respects except that Direct Claims are brought by a party subject to the indemnification obligations of the SPA. In any event, Direct Claims too, under the definition of "Action", must be pending before a court or similar governmental entity.

Tax Claims are also defined as "the assertion of any claim or the commencement of any Action against such Article VIII Indemnified Party, with respect to which the Article VIII Indemnifying Party may be obligated to provide indemnification...." SPA § 8.01(h). Thus, Tax Claims are similarly attached to the commencement of formal proceedings.

459 (1st Dep't 2013) (internal quotation marks omitted). This includes giving meaning to specifically defined terms in the SPA.

Thus, a Claim Notice under the SPA must refer to a specific, pending proceeding, such as a lawsuit. This holding necessarily informs the second issue the Court must address: whether the voluntary dismissal, without prejudice, of the Castillo Action finally resolved the claims specified in the June 23, 2016 Claim Notice.

The voluntary dismissal, without prejudice, of the Castillo Action finally resolved the claims specified in the June 23, 2016 Claim Notice because that Claim Notice was intended to provide notice of a specific proceeding "pending before or issued by any Governmental Authority" from which an indemnification obligation may arise. Once the Castillo Action was dismissed, the claim ceased to be "pending" and the commencement of the Centro Otologico Action on August 10, 2017 is of no consequence because it could not have been timely noticed before the June 30, 2016 Applicable Claims Deadline.

Defendants' assertion that the Centro Otologico Action was timely noticed by virtue of the June 23, 2016 Claim Notice is incorrect. The Centro Otologico Action was not a pending, formal proceeding at such time. Nor, as Defendants suggest, can the June 23, 2016 Claim Notice be read to impose an indefinite indemnification obligation with regard to all breaches of Section 6.15(a). This would amount to a general notice of potential indemnification obligations, completely untethered to a pending proceeding or a discernible loss, which may or may not result in a lawsuit that could, theoretically, be commenced years later.

That is an untenable reading of the SPA which was explicitly "intended to shorten the period otherwise provided by Law during which claims for breach of representations, warranties

and covenants can be made under [] Article X" and provided that "any such claims must be made on or prior to the Applicable Claims Deadline or be forever barred." SPA § 10.01(c).

Plaintiff's indemnification obligations with respect to the June 23, 2016 Claim Notice ceased when the Castillo Action was dismissed. Any Claim Notice with respect to the Centro Otologico Action, which was not commenced until over a year after the Applicable Claims Deadline, is necessarily time-barred.

Accordingly, it is hereby

ADJUDGED and DECLARED that the Defendants' December 29, 2017 Claim Notice is time-barred by the SPA; and it is further

ADJUDGED and DECLARED that the June 23, 2016 Claim Notice is finally resolved in accordance with the Decision & Order herein; and it is further

ORDERED that the escrow agent, to the extent all Claim Notices are finally resolved and this Decision & Order not subject to further appeals, disburse the remaining indemnification escrow funds in accordance with the SPA and the Indemnification Escrow Agreement.

2/25/2019
DATE

BARRY R. OSTRAGER, J.S.C.
BARRY R. OSTRAGER
JSC

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	X GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE