

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D23259
Y/prt

_____AD3d_____

Argued - January 16, 2009

STEVEN W. FISHER, J.P.
ANITA R. FLORIO
THOMAS A. DICKERSON
ARIEL E. BELEN, JJ.

2007-09543

DECISION & ORDER

North Fork Bank, plaintiff-respondent, v
Computerized Quality Separation Corp., et al.,
defendants-respondents, Norman J. Tepfer,
et al., appellants, et al., defendants.

(Index No. 14855/04)

Stein, Farkas & Schwartz, LLP, New York, N.Y. (Jeffrey M. Schwartz of counsel),
for appellants.

Jaspan Schlesinger Hoffman, LLP, Garden City, N.Y. (Stephen L. Ukeiley,
Christopher D. Palmieri, and Scott Fisher of counsel), for plaintiff-respondent.

Pittoni, Bonchonsky & Zano, LLP, Garden City, N.Y. (M. John Pittoni of counsel),
for defendants-respondents.

In an action, inter alia, to recover on a promissory note, the defendants Norman J. Tepfer and Jerry Tepfer appeal, as limited by their brief, from stated portions of an order of the Supreme Court, Suffolk County (Weber, J.), dated August 23, 2007, which, inter alia, granted that branch of the plaintiff's motion which was for summary judgment dismissing the counterclaim asserted by them to recover damages for breach of the covenant of good faith and fair dealing and, in effect, upon searching the record, awarded summary judgment to the defendants Computerized Quality Separation Corp. and Barry Green dismissing the cross claim for contractual indemnification asserted by them against those defendants.

ORDERED that the order is modified, on the law, by deleting the provision thereof which, in effect, upon searching the record, awarded summary judgment to the defendants

May 26, 2009

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Computerized Quality Separation Corp. and Barry Green dismissing the cross claim for contractual indemnification asserted against those defendants by the defendants Norman Tepfer and Jerry Tepfer; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

The Supreme Court properly granted that branch of the plaintiff's motion which was for summary judgment dismissing the counterclaim asserted against it by the defendants Norman J. Tepfer and Jerry Tepfer (hereinafter together the Tefpers) to recover damages for breach of the covenant of good faith and fair dealing. The plaintiff established, prima facie, its entitlement to judgment as a matter of law by submitting evidence that the personal guarantees executed by the Tefpers in connection with the subject promissory notes executed by the defendant Computerized Quality Separation Corp. (hereinafter CQS), contained a provision in which the Tefpers clearly and unequivocally waived, among other things, their right to interpose any counterclaims against the plaintiff. Such a waiver is not against public policy and will be enforced in the absence of fraud or negligence in the disposition of collateral (*see Fleet Bank v Petri Mech. Co.*, 244 AD2d 523; *European Am. Bank v Mr. Wemmick, Ltd.*, 160 AD2d 905, 906; *Federal Deposit Ins. Corp. v Marino Corp.*, 74 AD2d 620). In opposition, the Tefpers failed to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562).

However, the Supreme Court erred in searching the record and awarding summary judgment to the defendants CQS and Barry Green dismissing the cross claim for contractual indemnification asserted against those defendants by the Tefpers. Issues of fact exist as to whether a provision of a Stock Purchase Agreement entered into by CQS, Green, and the Tefpers provided that under certain circumstances, CQS and Green would indemnify the Tefpers (*see Mantovani v Whiting-Turner Contr. Co.*, 55 AD3d 799).

The Tefpers' remaining contentions are without merit.

FISHER, J.P., FLORIO, DICKERSON and BELEN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court