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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 16

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LORRAINE GOLDMAN,

Plaintiff,

- against - Index No. 105701/05

WHITE PLAINS CENTER FOR NURSING CARE, LLC and NMC ACQUISITION, LLC, Motion Seq. No. 004

Defendants.

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WHITE PLAINS CENTER FOR NURSING CARE, LLC and NMC ACQUISITION, LLC,

Third-Party Plaintiffs, Third-Party Index No. 591055/05

-against-

WESTCHESTER GERIATRIC CARE FOUNDATION, INC.,

Third-Party Defendant.

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SCHLESINGER, J.:

On February 15, 2006, I granted a pre-answer motion for dismissal brought by third-party defendant Westchester Geriatric Care Foundation ("Westchester") against defendant/third-party plaintiff White Plains Center for Nursing Care, LLC ("White Plains"). The third-party action had arisen from the main action wherein plaintiff Lorraine Goldman, who had been Administrative Director of the nursing homes in issue from April of 1990 until October 27 of 2004, when she was terminated from that position by White Plains, sued White Plains alleging breach of contract and age discrimination.

Westchester had been the previous owner of the nursing homes and Ms. Goldman's employer up until the moment that an agreement by White Plains to buy the property was consummated at the Closing on October 27, 2004. Negotiations between the buyer and seller had resulted in earlier agreements between them, namely an Asset Purchase Agreement and a Real Estate Purchase Agreement executed by White Plains as the buyer and Westchester as the seller on March 8, 2001. The reason for the three and one-half year delay between these dates was the time necessary for White Plains to obtain approval of the sale from the Attorney General.

At the Closing in October of 2004, the parties executed a final agreement titled the Omnibus Closing Agreement which contained the following clause, relevant to the issue now before this Court, whether the buyer White Plains is obliged to indemnify the seller Westchester for the attorneys' fees expended by Westchester in their successful motion against White Plains for dismissal of the third-party action.

> 5. Buyer hereby indemnifies Seller (including Seller's agents and representatives, and others acting on Seller's behalf) against all damages, losses, costs, liabilities, expenses, risks, and obligations (including reasonable attorneys' fees) associated with the Property (including any and all events and occurrences on or at the Property) at any time on or after the Closing. This provision shall survive the Closing.[1]

[1]There is an almost identical clause, paragraph 6 wherein the Seller agrees to indemnify the Buyer against all damages ("including reasonable attorneys' fees") for

Ms. Goldman's employment was terminated after the Closing. Therefore, if attorneys' fees were payable, paragraph 5 would apply. In the dismissal motion, Westchester included a demand for attorneys' fees pursuant to this paragraph. Unfortunately, while White Plains opposed the most important part of the motion seeking dismissal, it failed to address the attorneys' fees aspect of the moving papers.

Since I choose not to decide issues on default if possible, particularly when I believe as here that the default was inadvertent and because Westchester was asking for a considerable sum, I allowed the parties to file supplemental letter briefs on that issue. White Plains would first submit, followed by movant Westchester. However, in Westchester's submission, counsel included a new alternative argument for reimbursement of attorneys' fees, one pursuant to 22 N.Y.C.R.R. §130-1.1(a), that White Plains' third-party complaint should be considered "frivolous" in that it lacked merit in fact and law. I allowed White Plains then to submit a final letter addressing this new issue.

Let me deal first with that issue. Relevant here is this Court's language on page 8 of my earlier decision. I said:

> We've had really very interesting lengthy oral argument here, and it appears that the third-party action was brought under certain misconceptions made by the defendant, and

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any and all events and occurrences "at any time before the Closing." This provision also would survive the Closing.

> I understand the misconceptions, and I think to a large extent they rely on the use of the word "extension agreement" or "extension memos" used by Miss Goldman's counsel in the original petition.

White Plains had claimed in its third-party action that Westchester had failed to turn over to it all of the relevant documents bearing on the plaintiff's claim that she had been improperly terminated. However, it was clear that her April 1990 contract had been turned over. It was not so clear as to "extension memos" increasing Ms. Goldman's salary due to positive evaluations. Ms. Goldman in her papers had referred to these memos, as well as to the original contract. However, it became perfectly clear during oral argument on the motion to dismiss that, in fact, Ms. Goldman was not relying on these memos in her argument that she, contrary to White Plains' position, was not a mere employee at will. Her attorney Samuel Landau confirmed this fact on the record.

Therefore, though I granted Westchester's motion to dismiss, finding that there was no dispute that the April 1990 contract had been turned over to White Plains in 2001 and that the contract was the only truly relevant document vis-a-vis the main claim, I did understand how White Plains could be uncertain whether the memos were also relevant to this claim. Therefore, I find that the action was not brought frivolously so as to warrant the penalties described in 22 N.Y.C.R.R. §130-1.1(a).

The original dispute over the interpretation of paragraph 5, however, is a more challenging one to decide. In other words, it is a close question. White Plains, citing to decisions such as *Tokyo Tanker Company Limited v. Etra Shipping Corporation*, 142 AD2d 377 (First Dep't 1989), *lv. denied* 75 NY2d 702, argues that the language of an indemnity provision must be construed narrowly so as to encompass only what the parties actually intended. This is so, it asserts, because construing the indemnity provision to include reimbursement for attorneys' fees runs counter to the traditional United States rule that, barring some explicit agreement to the contrary or a statute, litigants pay for their own counsel fees.

White Plains additionally argues, citing to decisions such as *Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487 (1989) and *Oscar Gruss & Sons, Inc. v. Hollander*, 337 F.3d 186 (2nd Cir. 2003), that indemnification clauses such as the one appearing here are generally construed to cover only those attorneys' fees spent in defending against third-party claims, as opposed to actions like the instant one where one party to the contract sues the other.

Westchester counters that those cases can be distinguished because the contracts there had other clauses, such as a notice requirement of a lawsuit and options to assume the defense, which when read in their entirety with other language in the contract more properly could be understood to pertain only to third-party claims. Further, counsel points out that in the March 2001 Asset Purchase Agreement, specifically, in paragraph 10.4 which "will survive the Closing", the Buyer

agrees to indemnify the Seller:

> "against any and all claims, actions, losses, damages, costs, liabilities or expenses (the "Losses") of any kind or character, to the extent that such Losses arise from the ownership or the operation of the Facilities subsequent to the date of the Closing. Seller will notify Buyer of any such claim within 30 days of Seller's notification."

This paragraph 10.4, counsel argues, is the one that deals with third-party claims. Therefore, to interpret paragraph 5 as applying only to third-party claims would render that paragraph duplicative and unnecessary. *See Hooper*, 74 NY2d at 492-93.

Westchester's claim for attorneys' fees here is denied. Although there are certainly instances where courts construe an indemnification clause as providing for attorneys' fees to be reimbursed in an action where one party to a contract containing the clause sues another, it is a heavy burden on the so-called indemnitee to show that the clause is sufficiently applicable to the controversy to overcome the customary rule in our courts that a party pays its own litigation costs. Therefore, in cases where such indemnification is permitted, there has to be either explicit words in the clause spelling out such an obligation, or the agreement read in its entirety can offer no other alternative interpretation. *Promuto v. Waste Management Inc.*, 44 F. Supp. 2d 628 (S.D.N.Y. 1999) (J. William Conner) speaks to the former principle and *Breed, Abbott and Morgan v. Hulko*, 139 A.D.2d 71 (1st Dep't 1988), *aff'd* 74 NY2d

686 (1989), speaks to the latter.

In *Promuto*, an obligation to indemnify based on Section 5.3(a) of the parties' agreement was found even though the section did not expressly provide for indemnification in suits between the parties. However, when that section was read together with Section 4.2, the parties' intent to provide for such indemnification became clear, despite defendant buyer's "disingenuous" argument that indemnification applied only to third-party claims. 44 F. Supp.2d at 650-51.

In *Breed, Abbott & Morgan*, despite the fact that the indemnification clause between a law firm and the parties to a real estate transaction did not specifically include attorneys' fees, the majority opinion found under the circumstances that such indemnification was the only possible interpretation that could be given to the clause. Breed, Abbott & Morgan was the designated escrow agent in a contract for real property, obligated to turn over the down payment of $82,500 to the seller in the event the buyer defaulted. When Hulko, the buyer, failed to appear for the Closing, the down payment was released to the seller by Breed, Abbott. Hulko then sued the law firm, claiming that the release of the money was wrongful. At trial, Breed, Abbott & Morgan prevailed in that findings were made that Hulko had in fact defaulted and the firm had not acted in either bad faith or gross negligence, the only exceptions to indemnification. The firm then sued Hulko for its costs in defending the action. They prevailed because the court found that the indemnification clause, while not explicitly mentioning attorneys' fees as included, had to have meant that. Justice Leonard Sandler said (at p. 73):

> If this broadly phrased agreement to indemnify did not include legal expenses incurred in defending an action by one of the parties alleging misconduct by the escrowee which resulted in a determination in favor of the escrowee, it is difficult, if not impossible, to ascertain for what it was that the parties had agreed to indemnify the escrowee.

In the case at bar, neither the language of paragraph 5, nor its obvious import, nor its meaning when read together with the indemnification paragraph in the Asset Purchase Agreement, requires a similar result. Quite the contrary, paragraph 5 in the later 2004 Omnibus Agreement, along with a declaration of reciprocal rights for the buyer in paragraph 6, neither explicitly states, nor even suggests, that the phrase damages, loss, costs expenses etc. "associated with the Property (including any and all events and occurrences on or at the Property)" refers to expenses involved in defending against a lawsuit brought by a former employee wherein the sued party, the buyer, believed incorrectly that the seller should share responsibility for the claim. I cannot find that paragraph 5 was intended by the parties to cover such an event. Therefore, the relief sought, reimbursement of attorneys' fees expended by Westchester in defending against the third-party claim, is denied.

This constitutes the decision and order of this Court.

Dated: April 19, 2006

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ALICE SCHLESINGER J.S.C.