

**Schon v Goldfarb**

2006 NY Slip Op 30268(U)

December 14, 2006

Supreme Court, New York County

Docket Number:

Judge: Herman Cahn

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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: Herman Cahn  
Justice

PART 49

Schon, Henry

INDEX NO. 600574-2006

- v -  
Goldfarb, Larry

MOTION DATE October 23, 2006

MOTION SEQ. NO. 003

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE...**

**FILED**  
DEC 20 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 12/14/06

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 49

-----X  
HENRY SCHON, OTTO WEINGARTEN, HS CARE  
LLC, OAKWOOD LLC and THREE O FIVE LLC,

Plaintiffs,

-against-

Index No.  
600574/05

LARRY GOLDFARB, OAKWOOD OPERATING  
COMPANY, LLC, TENZER & LUNIN, LLP,  
SCOTT B. LUNIN, ESQ., AS PARTNER WITH  
TENZER & LUNIN, LLP, JOSEPH C. KAPLAN,  
ESQ., AS OF COUNSEL WITH TENZER & LUNIN,  
LLP,

Defendants.

-----X  
**HermanCahn, J.:**

Plaintiffs HS Care LLC, Three O Five LLC and Oakwood LLC move for partial summary judgment in the amount of \$1,150,000.00, plus interest, CLPR 3212. Defendants cross-move for leave to amend the Answer, CPLR 3025, which cross motion was granted at the oral argument of this motion and cross motion.

In this breach of contract action, plaintiffs seek the downpayment due to them from defendants, in connection with plaintiffs' assignment to defendants of their right to purchase a nursing home in Oakdale, New York from a third party. Defendants entered into a purchase agreement with the third party sellers, closed on the purchase of the nursing home, but then failed to pay plaintiffs the agreed upon consideration. The consideration for assigning the right to purchase was \$4,000,000, with \$500,000 to be paid from escrow shortly after the closing, \$500,000 to be paid several months thereafter and a \$3,000,000 promissory note. Plaintiffs seek

**FILED**  
DEC 20 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

\* 3 ]  
the two \$500,000.00 payments, as well as \$150,000 which they had placed in escrow with the seller.

Defendants assert that they had to assume more liabilities than were contemplated in their agreement with plaintiffs and that, therefore, the monies plaintiffs are seeking are not due them. Defendants claim that when they began operating the nursing home on February 9, 2004, the mortgage on the property was in arrears for over \$1,000,000 and that employees of the nursing home were owed over \$400,000 in accrued payroll and benefits. These liabilities were allegedly not included in the liabilities assumed by the defendants under the agreement among the parties; instead, they were retained by plaintiffs, who, according to defendants, were obligated to indemnify, defend and hold defendants harmless with respect to these liabilities. Defendants urge that they are entitled to set off the \$2,800,000 of liabilities paid by them against the purchase price.

### **BACKGROUND**

This action relates to the sale and operation of the Oakwood Care Center, a nursing home located at 345 Locust Avenue, Oakdale, New York (the Center). Plaintiff HS Care LLC was the receiver of the Center until February 9, 2004 (Complaint, ¶¶ 3-4; Amended Answer, ¶ 4). Plaintiff Oakwood LLC acted as a tenant and operator of the Center (Complaint, ¶ 7). Plaintiff Three O Five LLC leased the property for the Center (*id.*, ¶10). Plaintiff Henry Schon is a principal of HS Care LLC, Oakwood LLC and Three O Five LLC (*id.*, ¶¶ 5, 8, 11). Plaintiff Otto Weingarten is a principal of Three O Five LLC (*id.*, ¶ 11).

Defendant Oakwood Operating Company, LLC (Oakwood Operating) purchased plaintiffs' right to purchase the Center in the transaction which is the subject of this dispute.

Defendant Larry Goldfarb is a member of Oakwood Operating, and the other defendants are Oakwood Operating's corporate counsel (Complaint, ¶¶ 13-22; Amended Answer, ¶ 15).

Prior to August 12, 2002, Sam Klein was the principal of The Center, Oakwood Realty Corp. was the fee owner and Oakwood Care Center, Inc. was its operator (Complaint, ¶¶ 25-27). On August 12, 2002, Klein, Oakwood Realty and the Oakwood Care Center, Inc. (the Klein Companies) entered into an agreement with plaintiffs to sell the Center to them (*id.*, ¶ 28). As part of the agreement, plaintiff HS Care was designated as receiver of the Center, assuming responsibility for its daily operations and liabilities, pending the closing (*id.*, ¶¶ 29- 30; Plaintiffs' Statement of Uncontested Facts, ¶ 4). Subsequently, plaintiffs decided not to proceed with the purchase, so they sought to assign their purchase rights to the Center to a third party (Complaint, ¶ 32; Plaintiffs' Statement, ¶ 5).

On December 1, 2003, plaintiffs Three O Five, HS Care and Oakwood LLC entered into a written agreement with Oakwood Operating, whereby plaintiffs assigned their rights to purchase the Center to Oakwood Operating for \$4,000,000 (the Assignment Agreement) (Notice of Motion, Exh A, Plaintiffs' Statement, ¶ 6). The parties to the Assignment Agreement contemplated that Oakwood Operating would purchase the Center from the Klein Companies and operate it after receiving the State Department of Health's approval to do so, that an affiliate of Oakwood Operating would purchase the property and that another affiliate would take over the operation of the Center from HS Care, as substitute receiver, until Oakwood Operating was approved as the new established operator (Goldfarb Aff, ¶ 11).

The Assignment Agreement provided that the \$4,000,000 purchase price was to be paid as follows:

(a) a downpayment in the amount of Five Hundred Thousand (\$500,000) Dollars (the "Downpayment") shall be delivered by [Oakwood Operating], within two days after the execution of this Agreement by [Oakwood Operating] (hereinafter defined) to Tenzer and Lunin LLP (the "Escrow Agent"), who will serve as escrow agent and hold the Downpayment (hereinafter defined) and all interest accruing thereon in escrow in accordance with the provisions of the Escrow Agreement annexed hereto as Exhibit B, (b) an additional downpayment in the amount of Five Hundred Thousand (\$500,000) Dollars (the "Additional Downpayment") shall be delivered by [Oakwood Operating] to you upon the first anniversary of the Effective Date, and (b) Three Million (\$3,000,000) Dollars , with interest at the rate of seven-and-a-half percent (7.5 %) per annum accruing on and after the second anniversary of the Effective Date (the "Accrual Date"), payable in thirty-six (36) consecutive equal monthly installments commencing on the Accrual Date and evidenced by the Promissory Note of [Oakwood Operating] or its designee(s) referred to above, in the form annexed hereto as Exhibit C.

Notice of Motion, Exh A, Assignment Agreement at 2.

The Additional Downpayment referred to in the agreement was to be paid on the first anniversary of the State Department of Health's consent to the substitution of Oakwood Operating as the new receiver of the Center, referred to in the agreement as the Effective Date (Plaintiffs' Statement, ¶ 7).

The Assignment Agreement further provided that, expressly conditioned upon the payment by the Klein Companies of the \$150,000 being held in escrow for plaintiffs' benefit (the Seller Escrow), Oakwood Operating agreed to forward the Seller Escrow to plaintiffs within 15 days of Oakwood Operating's receipt of such escrow (id.). It stated that it was not imposing a duty on Oakwood Operating to collect this Seller Escrow or to pay it to plaintiffs, "provided that, at the Closing, [Oakwood Operating] shall pay to you an amount equal to the Seller Escrow to the extent the Seller Escrow was not previously forwarded to you in accordance with this

paragraph (id.).

Oakwood Operating agreed to assume certain liabilities of the Center as of the Effective Date. Plaintiffs agreed to provide Oakwood Operating with a preliminary list of the liabilities as of November 28, 2003 (the Preliminary Scheduled Liabilities), and agreed to provide a complete list of liabilities as of the Effective Date (the Scheduled Liabilities), within 15 days thereafter (Notice of Motion, Exh A, Assignment Agreement at 3). Plaintiffs

acknowledge[d] [sic] that [Oakwood Operating] or its designee [did] not assume any of the liabilities that are not listed on the Preliminary Scheduled Liabilities or any of the liabilities on the Scheduled Liabilities to the extent that the aggregate amount of Scheduled Liabilities exceeds the aggregate amount of Preliminary Scheduled Liabilities by more than Two Hundred Fifty Thousand Dollars (\$250,000) Dollars. [Plaintiffs] acknowledge[d] [sic] that all liabilities not expressly assumed by [Oakwood Operating] or its designee shall be retained by [plaintiffs]

(id. at 3).

The Schedule of Liabilities, plus \$250,000, is the sum of \$4,351,211.15 (Plaintiffs' Statement, ¶ 8; see Notice of Motion, Exh A, Assignment Agreement at 3 and attached schedule). The Assignment Agreement further provided that plaintiffs agreed to indemnify Oakwood Operating "against any and all liabilities of the Receiver arising prior to the Effective Date and not expressly assumed by [Oakwood Operating] in this Agreement" (Notice of Motion, Exh A, Assignment Agreement at 5). On February 9, 2004, HS Care stopped operating the Center as receiver and an entity operated by defendant Goldfarb, Oakwood Receiver, took over as temporary receiver (Plaintiffs' Statement, ¶ 9; Defendants' Statement, ¶ 9). Thus, February 9, 2004 became the Effective Date (Goldfarb Aff., ¶ 16). Thereafter, defendants waited for the State Department of Health to approve their ownership and operation of the Center (Plaintiffs'

[\* 7 ]  
Statement, ¶ 10; Defendants' Statement, ¶ 10).

After Oakwood Receiver became the receiver of the Center, it learned that the mortgage on the property was in arrears in the amount of \$1,290,582.91 (Goldfarb Aff., ¶ 17 and Exh 5). By early March 2004, Oakwood Receiver had paid the entire mortgage arrears due (Goldfarb Aff., ¶ 17 and Exh 6). It also paid employees of the Center payroll and accrued benefits owed to them in the amount of \$434,255.71 (Goldfarb Aff., ¶ 4). Oakwood Operating claims that, after Oakwood Receiver began operating the Center, it also paid outstanding balances to certain vendors of the Center. These balances, owed by plaintiffs with respect to liabilities retained by them, had grown from \$4,104,211.05 on November 28, 2003 to over \$7,000,000 as of the Effective Date (February 9, 2004) (Goldfarb Aff., ¶ 18).

In December 2004, in anticipation of closing, drafts of closing documents were exchanged (Plaintiffs' Statement, ¶¶ 11-12). On December 22, 2004, plaintiffs' counsel wrote defendants' counsel, defendant Tenzer and Lunin, attaching wire instructions for the disbursement of the consideration to be paid plaintiffs pursuant to the Assignment Agreement (Plaintiffs' Statement, ¶ 15; see also Notice of Motion, Exh D). The closing of the transaction between the seller, the Klein Companies and defendants occurred on December 23, 2004 (id., ¶ 17). On that date, at defendants' request, plaintiffs drafted and executed a Bill of Sale and Assignment of Rights to the Seller Escrow (Notice of Motion, Exh E, F). Plaintiffs did not receive any of the consideration set forth in the Assignment Agreement (Plaintiffs' Statement, ¶ 20).

Plaintiffs brought its claims, asserting five causes of action (Notice of Motion, Exh H). The first cause of action is for breach of contract against defendants Goldfarb and Oakwood

Operating, alleging that defendants failed to pay any of the \$4,000,000 purchase price (Complaint, ¶¶ 59-64). The second, third and fifth causes of action for fraud and unjust enrichment have already been dismissed on a prior motion to dismiss (Notice of Motion, Exh I). Finally, the fourth cause of action is against attorney defendant Tenzer and Lunin for breach of the escrow agreement, alleging that this defendant failed to release the \$500,000 downpayment that they were holding in escrow as escrow agents upon the closing of the purchase (Complaint, ¶¶ 50-91).

After plaintiffs made this motion for partial summary judgment, defendants cross-moved to amend their answer. The cross motion was granted by this Court and, therefore, the Amended Answer (Goldfarb Aff Exh 1), will be considered on this motion. In the Amended Answer, defendants Goldfarb and Oakwood Operating deny the material allegations, asserting nine affirmative defenses and six counterclaims. In the affirmative defenses, defendants assert that the contract claims fail to state a claim (Amended Answer, ¶¶ 65-67), and that Oakwood Operating is not obligated to pay the purchase price because of plaintiffs' material breaches (*id.*, ¶70). They also assert that plaintiffs cannot recover on the promissory note because one of the holders of the note, Abraham Shaulson, is not named a party in the action and other plaintiffs, Oakwood LLC and HS Care, are named as plaintiffs but are not note holders (*id.*, ¶¶ 68-69). The other affirmative defenses assert that defendants were only obligated to pay the \$150,000 Seller Escrow if it was paid to them, which it was not (*id.*, ¶¶ 71-72), and that the provisions of the Escrow Agreement, regarding releasing the \$500,000 downpayment were not complied with, so no payment was permitted at the Klein closing (*id.*, ¶ 73). The ninth through eleventh affirmative defenses and the first through third counterclaims allege that plaintiffs breached the Assignment

Agreement: by failing to deliver a true and complete itemized Schedule of Liabilities, and failing to deliver it within 15 days of the Effective Date; by failing to deliver personal indemnifications of their members; and by failing to indemnify defendants for liabilities Oakwood Operating paid, but which plaintiffs retained under the Assignment Agreement, which breaches caused defendants to expend not less than \$2.8 million (*id.*, ¶¶ 74-92). The remaining defenses and counterclaims assert claims of unjust enrichment and conversion, and seek a declaration that plaintiffs are obligated to defend, indemnify and hold harmless Oakwood Operating with regard to actions commenced by vendors of the Center (*id.*, ¶¶ 93-105).

In this motion, plaintiffs urge that they should be granted partial summary judgment on their contract claim for the cash amounts due upon defendants' purchase of the Center. This includes: the \$500,000 downpayment due upon closing; the \$500,000 due upon the first anniversary of the Department of Health's consent to substitute Oakwood Operating as receiver, which date was February 9, 2005; and the \$150,000 deposited with the Klein Companies as the Seller Escrow, which plaintiffs claim was due on the closing in accordance with the Assignment Agreement. Plaintiffs argue that there is no dispute that defendants have not paid this consideration and, therefore, partial summary judgment in the amount of \$1,150,000 must be granted to them.

In opposing plaintiffs' motion, defendants contend that plaintiffs agreed in the Assignment Agreement that they retained certain liabilities not scheduled on the Schedule of Liabilities and that plaintiffs would indemnify Oakwood Operating for liabilities arising prior to the Effective Date (February 9, 2004) and not expressly assumed by Oakwood Operating. As a result, defendants argue, plaintiffs owe Oakwood Operating over \$2,800,000 in retained

liabilities. Defendants, therefore, urge that there are material issues of fact as to whether plaintiffs are entitled to payment of their claim in light of defendants' set-off. Defendants argue that to grant plaintiffs partial summary judgment on their claims, while leaving defendants' claim for later adjudication, would constitute an absurdity by making defendants pay plaintiffs when plaintiffs actually owe defendants. They contend that all they are seeking is a trial on their indemnification claim against plaintiffs and the right to set off the amount of their indemnification claim, as proven at trial, against plaintiffs' claim. In addition, defendants argue that, with regard to the \$150,000 Seller Escrow, the Assignment Agreement provides that Oakwood Operating was only obligated to make that payment upon the payment of that amount from the Klein Companies (Assignment Agreement at 2). Defendant Goldfarb states in his affidavit that the Klein Companies never paid anything to Oakwood Operating regarding this Seller Escrow (Goldfarb Aff., ¶ 26). Accordingly, defendants maintain that plaintiffs are not entitled to summary judgment with regard to this payment either.

In reply, plaintiffs assert that only the \$3,000,000 Promissory Note, executed in connection with the Assignment Agreement, gives defendants a right of set-off. The Note states that Oakwood Operating, as maker of the note, "reserves the right to assert any and all defenses, claims, set-off and reductions for any reason whatsoever, including . . . claims it may have against [plaintiffs]" (Notice of Motion, Exh A, Promissory Note at 2). Based on this, plaintiffs contend that defendants may only set-off the claimed \$2,800,000 in liabilities, above the \$4,300,000 million cap of liabilities assumed by defendants under the agreement, against the monies defendants were obligated to pay under the Promissory Note, and not against the first \$1,000,000 of the purchase price due plaintiffs.

## DISCUSSION

The motion is granted only to the extent that partial summary judgment of liability, on the first cause of action for breach of the Assignment Agreement as against defendant Oakwood Operating, is granted. The issue of the amount of damages shall be determined at the same time as defendants' counterclaims, seeking to offset the amounts they claim plaintiffs owe them, are decided.

Plaintiffs have demonstrated that defendants breached the Assignment Agreement by their nonpayment of the consideration due thereunder. Defendants fail to raise a triable issue of fact as to liability on that claim. However, defendants have raised a triable issue as to whether any damages are due and, if so, the amount of damages, in light of their claims of set-off arising under the same agreement.

The elements for a breach of contract claim are: (1) the existence of a contract; (2) performance of the contract by the damaged party; (3) breach by the other party; and (4) damages (Noise In Attic Productions, Inc. v London Records, 10 AD3d 303 [1<sup>st</sup> Dept 2004]; accord J & L American Enterprises, Ltd. v DSA Direct, LLC, 10 Misc 3d 1076(A) [Sup Ct, NY County 2006]).

Where the parties to a contract set down their agreement "in a clear, complete document, their writing should, as a rule, be enforced according to its terms" (W.W.W. Assoc. v Giancontieri, 77 NY2d 157, 162 [1990]; accord R/S Assoc. v New York Job Dev. Auth., 98 NY2d 29 [2002]). Where the writing is unambiguous, and its intent clear, interpretation is a matter of law and may be determined on summary judgment (American Express Bank Ltd. v

Uniroyal, Inc., 164 AD2d 275, 277 [1<sup>st</sup> Dept 1990], appeal denied 77 NY2d 807 [1991]).

Here, the Assignment Agreement is clear and unambiguous, and expressly provides that defendant Oakwood Operating make certain payments to plaintiffs. These include: the \$500,000 initial downpayment upon the closing; the \$500,000 payment on the one year anniversary of the Effective Date, which occurred on February 9, 2005; and the \$150,000 Seller Escrow. Defendants' argument that the Seller Escrow provision only requires them to pay the Seller Escrow if the Klein Companies pay it to defendants, is rejected. This interpretation ignores the final clause of that provision, which states clearly that "provided that, at the Closing, [Oakwood Operating] shall pay to [plaintiffs] an amount equal to the Seller Escrow to the extent that the Seller Escrow was not previously forwarded to [plaintiffs] in accordance with this paragraph" (Notice of Motion, Exh A, Assignment Agreement at 2). It is undisputed that the Seller Escrow was not previously forwarded to plaintiffs and it is also undisputed that defendant Oakwood Operating has failed to make any of the payments sought by plaintiffs. In light of the unambiguous Assignment Agreement, plaintiffs have established a breach of contract by defendant Oakwood Operating in failing to pay this consideration. Thus, partial summary judgment of liability on this breach of contract claim is granted (see Daiichii Seihan USA, Inc. v Infinity USA, Inc., 214 AD2d 487 [1<sup>st</sup> Dept 1995]).

While defendants have not raised fact issues on their liability, they make a sufficient showing that plaintiffs may owe defendants more than the \$1,150,000 plaintiffs are seeking on their claim and that defendants are entitled to set off any amounts owed to plaintiffs against the amounts plaintiffs owe defendants. An offset of debts will be allowed where the claims are mutual (Matter of Midland Ins. Co., 79 NY2d 253, 264 [1992]). Generally, "[c]ontracting

principals, who are debtors and creditors of each other by virtue of entry into a contract or contracts, may have the same legal capacity and may set off debts against each other” (id. at 264; see also J.B.I. Indus., Inc. v Suchde, 2000 WL 1174997 \* 9 [SD NY 2000] [“The common law doctrine of setoff allows parties who owe mutual debts to each other to assert the amounts owed, subtract one from the other, and pay only the balance”]). The purpose of the doctrine of setoff is to avoid the “absurdity of making A pay B when B owes A” (In re Bennett Funding Group, Inc., 146 F3d 136 [2d Cir 1998], quoting Studley v Boylston Nat. Bank of Boston, 229 US 523, 528 [1913]). The doctrine may be applied even in the context of an indemnification claim (see Russgood Const. Co. v City of New York, 50 AD2d 943, 944 [2d Dept 1975]).

Here, the debts clearly are mutual because they all arise out of the Assignment Agreement. As defendants aptly argue, it would be absurd to order defendants to pay plaintiffs when it appears that defendants have an offset in an amount that is more than double the amount plaintiffs seek from defendants. To ensure that a judgment rendered here “does justice in view of the one transaction as a whole” (Bendat v Premier Broadcast Group, Inc., 175 AD2d 536, 539 [3d Dept 1991], quoting National Cash Register v Joseph, 299 NY 200, 203 [1949]), all aspects of the offsetting claims must be examined and determined, after plaintiffs have responded to them, before a judgment on any damages due plaintiffs can be made.

Accordingly, it is

ORDERED that the motion for partial summary judgment is granted on the first cause of action against defendant Oakwood Operating as to liability only; and it is further

ORDERED that the defendants’ cross motion for leave to amend the answer is granted, and the amended answer in the proposed form annexed to the cross motion papers shall be

deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the plaintiffs shall serve a reply to the amended answer within 20 days from the date of said service.

Dated: December 14, 2006

ENTER:

  
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J.S.C.

**FILED**  
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