[*1] SCANNED ON 7/14/2006

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

PRESENT: [redacted] PART 49

Index Number : 603151/2003

DEVENTER, JOHN M.

VS

CS SCF MANAGEMENT

Sequence Number : 011

DECLARATORY JUDGMENT

INDEX NO. _____

MOTION DATE 11/9/05

MOTION SEQ. NO. 011

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
JUL 14 2006
COUNTY CLERK'S OFFICE
NEW YORK

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

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

Dated: 7/12/06

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

----------X

JOHN M. VAN DEVENTER, JAMES R. CLARK, and C2C CONSULTANTS, LTD.,

Plaintiffs,

-against-

Index No. 603151/03

CS SCF MANAGEMENT LIMITED, CREDIT SUISSE FIRST BOSTON, CREDIT SUISSE FIRST BOSTON (USA), CS CAPITAL PARTNERS, LTD., CS STRUCTURED CREDIT FUND, LTD., CREDIT SUISSE FUND ADMINISTRATION LIMITED, and QUEENSGATE BANK AND TRUST COMPANY, LTD.,

Defendants.

----------X

Herman Cahn, J.:

Plaintiffs move for a declaration that defendants CS Structured Credit Fund, Ltd., (the Fund), CS Capital Partners, Ltd., (Holdco), and CS SCF Management Limited (the Manager), (collectively, the CS defendants), are contractually bound to indemnify plaintiffs for their costs and expenses, including reasonable attorneys' fees, incurred in this action. The CS defendants cross-move for sanctions equal to their costs and attorneys' fees, 22 NYCRR 130-1.1.

The underlying facts and procedural history of this action are fully set forth in this court's prior order dated September 14, 2005, and will not be repeated here, except as is necessary for clarification.

Briefly, this action arises out of the termination of a joint venture formed in December 1995 by Van Deventer and defendant Credit Suisse First Boston (CSFB) to create and operate a structured credit investment funds business in which Van Deventer would manage a family of investment funds sponsored and supported by CSFB. Plaintiffs commenced this action to enforce the terms of a series of restructuring agreements into which the parties entered in 1999, including a strategic consulting agreement (the 1999-SCA) between plaintiff C2C and the CS defendants, and to recover certain fees, including a break-up fee, allegedly owed by the CS defendants to plaintiffs. For purposes of the within motion, the relevant provisions of the 1999-SCA are those regarding the obligation of the Fund, Holdco, and the Manager to indemnify C2C for its attorneys' fees in certain circumstances (see 1999-SCA, § 8.2).

By letter dated April 4, 2005, Van Deventer demanded that the CS defendants indemnify plaintiffs for the legal fees and expenses they incurred in this action through March 31, 2005, on the ground that, because this action arises out of the 1999-SCA, the CS defendants are contractually bound to indemnify plaintiffs. By letter dated April 13, 2005, CSFB rejected the demand. To date, the CS defendants have refused to indemnify plaintiffs.

Plaintiffs now seek a declaration that the Fund, Holdco, and the Manager are bound by the 1999-SCA to reimburse C2C and its affiliates,[1] including Van Deventer and

[1] The term, "affiliates," is defined by the 1999-SCA as C2C officers, directors, members, employees, shareholders, and their legal representatives (see 1999-SCA, § 8.1). There is no

Clark, for their costs and expenses, including reasonable attorneys' fees, incurred in this action.

In opposition, the CS defendants contend, first, that the motion is procedurally improper because, in the first amended complaint, plaintiffs do not seek a judgment declaring the rights and obligations of the parties under the 1999-SCA indemnification provisions and that, therefore, they have not received notice of the claim and have not conducted discovery related to the claim.

To obtain a declaratory judgment, a party should commence a plenary proceeding seeking such relief, rather than merely proceed by motion (Fensterheim v Fensterheim, 96 Misc 2d 108 [Sup Ct, NY County 1978]; see CPLR 3001). However, a party's failure to seek a declaratory judgment in the pleadings is not a fatal defect. Section 103 (c) of the CPLR empowers the court to convert the litigation to an action for a declaratory judgment, in the interests of justice (see e.g. Matter of Bott v Board of Educ. Deposit Cent. School Dist., Broome County, 51 AD2d 81 [3d Dept 1976]; Holtzman v Power, 34 AD2d 779 [1st Dept 1970]; see NY Jur, Declaratory Judgments, § 128 [2005 2d ed]).

Here, such conversion is not necessary. In the second cause of action of the first amended complaint, plaintiffs seek a judicial declaration that the CS defendants breached the 1999-SCA. In the ad damnum clause, plaintiffs demand reimbursement of their costs and attorneys' fees in prosecuting this action. Thus, the pleadings gave the CS defendants

---

dispute that Van Deventer and Clark are shareholders and, therefore, affiliates.

actual notice of the claim.

The CS defendants also contend that plaintiffs' demand for a declaratory judgment is procedurally improper because an equitable remedy is not appropriate where the claim is, in essence, a breach of contract claim. "Where alternative conventional forms of remedy are available, resort to a formal action for declaratory relief is generally unnecessary and should not be encouraged" (Bartley v Walentas, 78 AD2d 310, 312 [1st Dept 1980]). The purpose of declaratory relief "is to serve a practical end 'in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations'" (id., quoting James v Alderton Dock Yards, 256 NY 298, 305, reargument denied 256 NY 681 [1931]). Here, a declaratory judgment is appropriate because it will provide guidance regarding the parties' prospective obligations under the indemnification and hold harmless clause, in the event another action is commenced between the contracting parties arising out of the 1999-SCA or these parties and a third party. Further, plaintiffs may well be entitled to indemnification in addition to other damages.

For these reasons, the motion is procedurally proper and will be considered on the merits.

The CS defendants next oppose the motion on the ground that the 1999-SCA indemnification provision, by its terms, does not apply to lawsuits between the contracting parties.

"Under the general rule, attorneys' fees and disbursements are incidents of

litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule" (A.G. Ship Maintenance Corp. v Lezak, 69 NY2d 1, 5 [1986]).

Indemnity contracts are subject to the same rules of construction and interpretation as are other contracts (see generally American Express Bank Ltd. v Uniroyal, Inc., 164 AD2d 275 [1st Dept 1990], appeal denied 77 NY2d 807 [1991]). Thus, "[i]t is the general rule that an indemnification agreement between sophisticated business entities will be construed as intending to indemnify either party for its own wrongdoing only when the language in the agreement clearly connotes an intent to provide for such indemnification" (Facilities Dev. Corp. v Miletta, 180 AD2d 97, 102 [3d Dept 1992]). "Inasmuch as a promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney's fees, the court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise" (Hooper Assocs., Ltd. v AGS Computers, Inc., 74 NY2d 487, 492 [1989]). A contract assuming the obligation to indemnify attorneys' fees must be strictly construed (id.). The court may not "rewrite the contract and supply a specific obligation the parties themselves did not spell out" (Tonking v Port Auth. of New York & New Jersey, 3 NY3d 486, 490 [1st Dept 2004]).

In determining whether one party is required to indemnify another party, the court

must look to the language and purpose of the entire agreement, as well as the surrounding facts and circumstances (Torres v Morse Diesel Intl., Inc., 14 AD3d 401 [1st Dept 2005]; Facilities Dev. Corp. v Miletta, 180 AD2d 97, supra, [indemnification denied where provision did not contain language clearly permitting plaintiff to recover counsel fees from defendant and other provisions in contract unmistakably related to indemnification related to third-party claims against plaintiff]).

The 1999-SCA indemnification provision provides in relevant part that:

> To the fullest extent permitted by law, each of the [CS defendants] jointly and severally shall indemnify, defend and hold harmless [C2C] and each Affiliate and the legal representatives of any of them (each, an "Indemnified Party"), from and against any and all losses, claims damages, liabilities, costs and reasonable expenses, including amounts paid in settlement . . . suffered or sustained by an Indemnified Party in relation to the Fund or to this Agreement including, without limitation, any judgement, settlement, reasonable legal fees and other costs or expenses incurred in connection with the defence of any actual or threatened action or proceeding[,] except to the extent that any such Losses resulted from the bad faith, wilful misconduct or gross negligence of the Indemnified Party.

(1999-SCA, § 8.2 [emphasis added].)

The provision further provides that C2C "shall not be required to take any legal action on behalf of the [CS defendants] unless fully indemnified to its reasonable satisfaction" (1999-SCA, § 8.5 [emphasis added]).

By its clear terms, the indemnification provision obligates the CS defendants to indemnify plaintiffs with regard to any claims asserted by C2C against third-parties or by

third-parties against any 1999-SCA signatory. The provision specifically refers to costs incurred in the defense of an action, and does not refer to costs incurred in prosecuting an action against the Fund, Holdco, or the Manager. Significantly, the indemnification and hold harmless language employed in the provision is typical of language used when reimbursement of an indemnitee for damages on a third-party claim is required, but is not typical of provisions requiring indemnification between contracting parties (see Hooper Assocs., Ltd. v AGS Computers, Inc., 74 NY2d 487, supra).

The provision refers not just to reimbursement of attorneys' fees, but also to indemnification of sums paid, including judgments and settlements. To interpret the provision as requiring the CS defendants to reimburse plaintiffs for sums paid by plaintiffs in settlement of the instant action would render the provision illogical. Moreover, contrary to plaintiffs' interpretation, nothing in the provision indicates that it is applicable to offensive actions by C2C and its affiliates against any of the CS defendants, such as the action at bar.

Plaintiffs' reliance on Salovaara v Eckert, (6 Misc 3d 1005[A], 2005 WL 41560 [Sup Ct, NY County 2005]), is misplaced. The decision provides no guidance in the circumstances presented here. While both the provision in Salovaara and the provision at issue use similar language, i.e. they provide for indemnification to "the fullest extent permitted by law" (see id.; 1999-SCA, § 8.2), significantly, the provision in Salovaara was subject to the law of the Cayman Islands (see id.), while, here, the provision is

subject to the law of New York (see 1999-SCA, § 18.1). Cayman Islands law, unlike the more restrictive New York law, "permits a broad range of indemnification and can include reimbursement of the expenses incurred as a plaintiff" (Salovaara v Eckert, 6 Misc 3d 1005 [A]).

Therefore, the motion for an order granting summary judgment and a judicial declaration is granted to the limited extent that the court declares that the CS defendants are not contractually bound to indemnify plaintiffs for costs and expenses, including reasonable attorneys' fees, incurred in the prosecution of this action.

In the cross motion, the CS defendants seek to impose sanctions on plaintiffs equal to their costs and attorneys' fees incurred in opposing plaintiffs' motion to recover attorneys' fees, on the ground that the motion constitutes frivolous motion practice, pursuant to 22 NYCRR 130-1.1.

The cross motion is denied. As discussed above, the motion is procedurally proper. In addition, although plaintiffs' arguments were not persuasive, they were not so completely without merit so as to be frivolous, as that word is defined by 22 NYCRR 130-1.1 (c). "In considering the imposition of sanctions[,] the court must weigh the potential effect on inhibiting good-faith arguments to modify existing law" (W.J. Nolan & Co. v Daly, 170 AD2d 320, 321 [1st Dept 1991] [internal citation omitted]).

Accordingly, it is

ORDERED that the motion is granted to the extent that summary judgment is

granted against plaintiffs John M. Van Deventer, James R. Clark, and C2C Consultants, Ltd., and in favor of defendants CS Structured Credit Fund Ltd., CS Capital Partners, Ltd., and CS SCF Management Limited, and it is declared that these defendants are not contractually bound to indemnify plaintiffs for costs and expenses, including reasonable attorneys' fees, incurred in actions between the contracting parties, and the claims to recover such costs and expenses are severed and dismissed; and it is further

ORDERED that the cross motion for sanctions is denied; and it is further

ORDERED that the Clerk of the Court is directed to mark his records accordingly.

Dated: July 12, 2006

ENTER:

J.S.C.

FILED
JUL 14 2006
COUNTY CLERK'S OFFICE
NEW YORK