Saphir Intl., SA v UBS Painewebber Inc.

2007 NY Slip Op 30197(U)

March 9, 2007

Supreme Court, New York County

Docket Number: 0603661

Judge: Karla Moskowitz

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SCANNED ON 3/15/2007

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

PRESENT: Hon. KARLA MOSKOWITZ Justice PART 03

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SAPHIR INTERNATIONAL, SA,

Paintifff,

-against-

UBS PAINEWEBBER INC., MARC ROUSSO, RANI MERKEL, ALBERTO MURO, LEON LIPKIN, SEBASTIAN BARENBOIM, ERIC KIRCHGAESSER,

Defendants.

---x

ALBERTO MURO,

Defendant and Third-Party Plaintiff,

-against-

JACQUES HEYER,

Third-Party Defendant.

---x

RANI MERKEL,

Defendant and Third-Party Plaintiff,

-against-

JACQUES HEYER,

Third-Party Defendant.

---x

LEON LIPKIN,

Defendant and Third-Party Plaintiff,

-against-

JACQUES HEYER,

Third-Party Defendant.

---x

UBS FINANCIAL SERVICES INC.

Third-Party Plaintiff,

-against-

MARC A. ROUSSO, JACQUES HEYER, and HEYER MANAGEMENT, S.A.,

Third-Party Defendants.

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MOTION DATE ________

MOTION SEQ. NO. 007

MOTION CAL. NO. ________

FILED
MAR 13 2007
NEW YORK
COUNTY CLERK'S OFFICE

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 is decided in accordance with the accompanying Decision and Order.

Dated: March 9, 2007

KARLA MOSKOWITZ *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 3

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SAPHIR INTERNATIONAL, SA,

Plaintiff,

Index No. 603661/2002

-against-

UBS PAINEWEBBER INC., MARC ROUSSO, RANI MERKEL, ALBERTO MURO, LEON LIPKIN, SEBASTIAN BARENBOIM, ERIC KIRCHGAESSER,

Defendants.

DECISION and ORDER

---x

ALBERTO MURO,

Defendant and Third-Party Plaintiff,

-against-

JACQUES HEYER,

Third-Party Defendant.

---x

RANI MERKEL,

Defendant and Third-Party Plaintiff,

-against-

JACQUES HEYER,

Third-Party Defendant.

---x

LEON LIPKIN,

Defendant and Third-Party Plaintiff,

-against-

JACQUES HEYER,

Third-Party Defendant.

---x

UBS FINANCIAL SERVICES INC.

Third-Party Plaintiff,

-against-

MARC A. ROUSSO, JACQUES HEYER, and HEYER MANAGEMENT, S.A.,

Third-Party Defendants.

---x

FILED
MAR 13 2007
NEW YORK
COUNTY CLERK'S OFFICE

KARLA MOSKOWITZ, J.:

Plaintiff Saphir International, SA ("Saphir") commenced this action to recover

approximately $5 million in losses that it incurred as a result of a "pump and dump" stock scheme that defendant and third-party defendant Marc Rousso allegedly masterminded. Several employees of defendant and third-party plaintiff UBS Financial Services Inc., formerly known as UBS PaineWebber Inc. ("PaineWebber"), in addition to others, allegedly participated in the scheme. PaineWebber instituted a third-party action against Rousso for indemnification and against Jacques Heyer and Heyer Management, SA for contribution.

Rousso now moves to dismiss the third-party claim for indemnification (CPLR 3211 [a] [5] and [a] [7]).

Background

Plaintiff Saphir is a Panamanian-based company that provided investment income to its beneficiary. Between 1994 and 1998, Saphir invested more than $5 million in worthless stocks Rousso promoted and primarily sold. Saphir's director and principal, third-party defendant Jacques Heyer, whom Rousso contacted in 1995 undertook all the transactions in which Saphir participated. (Complaint, ¶ 18). According to the complaint, Rousso misrepresented the value of the stocks that he promoted and sold to Saphir and hid his substantial holdings in the stocks. Unbeknownst to Heyer, subsequent to each stock sale to Saphir, Rousso secretly pocketed the funds. (Complaint, ¶¶ 39, 40).

Two former PaineWebber senior vice presidents, defendants Rani Merkel and Alberto Muro, allegedly participated in Rousso's scheme. According to the complaint, Merkel and Muro misrepresented to Heyer that PaineWebber underwrote or supported Rousso's stock offerings. (Complaint, ¶¶ 12, 39, 45). Merkel allegedly provided Heyer with information regarding PaineWebber accounts to wire funds to pay for the worthless stock subscriptions. (*Id.* at 22).

Additionally, Merkel and Muro allegedly provided Rousso with an office, secretary, telephone and computer in PaineWebber's New York office where Heyer first met Rousso in person. (*Id.* at ¶¶ 32, 34-5, 81).

Other participants in the scheme included defendants Leon Lipkin, Rousso's securities attorney, who allegedly filed fraudulent documents with the Securities and Exchange Commission in connection with the stock sales to Saphir; Sebastian Barenboim, one of Rousso's "bagmen," who allegedly permitted Rousso to use his bank accounts to convert the proceeds of the stock sales into cash, and Eric Kirchgaesser. (Complaint, ¶¶ 14-6, 106). The complaint alleges that Rousso, Merkel, and Muro paid Kirchgaesser, an FBI employee, to monitor the FBI computer system and databases in order to determine whether federal investigators had issued arrest warrants for any of the scheme's participants. (Complaint, ¶ 16).

In 1999, federal investigators uncovered the scheme and arrested all of the defendants named in this action. (*Id.* at ¶ 63). Rousso pled guilty to federal money laundering and stock fraud charges in connection with his role in the scheme. He agreed to forfeit $4 million in fees that he earned from the stock sales to Saphir and others. (*Id.* at ¶ 11). Merkel and Muro pled guilty to federal securities and banking violations in 2002 and each agreed to forfeit $500,000 in commissions that PaineWebber received from the transactions. (*Id.*). Lipkin and Kirchgaesser both pled guilty to the charges against them. Barenboim was sentenced to probation. (*Id.* at ¶¶ 14-6).

The First-Party Action

Saphir commenced this action in December of 2002, asserting claims for: (1) fraud and aiding and abetting fraud against all defendants and (2) vicarious liability against PaineWebber.

The claim against PaineWebber relies upon allegations that Merkel and Muro acted within the scope of their employment and that PaineWebber allegedly held Rousso and Saphir out to the investing public as its agents for the sale and promotion of stocks that PaineWebber underwrote.

In its answer, PaineWebber asserted cross-claims for indemnification against Rousso, Merkel and Muro, and contribution against Rousso, Merkel, Muro, Lipkin, Barenboim and Kirchgaesser.

In May of 2004, Rousso settled with Saphir, and this Court dismissed the complaint against him with prejudice. The following month, this Court dismissed the complaint against the remaining defendants, PaineWebber, Merkel, Muro and Leon Lipkin. The Appellate Division, First Department reinstated the complaint in January 2006. (*Saphir Intl., SA v UBS PaineWebber Inc.*, 25 AD3d 315 [1st Dept 2006]).

The Third-Party Action

PaineWebber commenced a third-party action against Rousso, Heyer and Heyer Management, SA, in April of 2006. In its third-party complaint, PaineWebber asserts a claim for indemnity against Rousso, based upon Saphir's allegations against PaineWebber for vicarious liability and Rousso's primary misconduct, in the event that it is found liable to Saphir. PaineWebber asserts a second claim for contribution against Heyer and Heyer Management, SA.

Discussion

On a motion to dismiss for failure to state a cause of action, "pleadings shall be liberally construed and policy considerations against dismissing third-party actions require that such complaints be entitled to a more liberal reading than others." (*Harrison v Golden Tree Homes Inc.*, 199 AD2d 205, 205 [1st Dept 1993]).

Rousso moves to dismiss the third-party complaint on the ground that the discontinuance of this action against him with prejudice in 2004 following his settlement with Saphir bars any claim for indemnity and contribution against him, under General Obligations Law ("GOL") § 15-108 [b], and that there is no relationship between him and PaineWebber giving rise to a duty to indemnify.

PaineWebber argues that its claim against Rousso for implied indemnity is viable on two separate grounds. First, because Saphir's claims against PaineWebber assert vicarious liability based upon an agency relationship between PaineWebber and Rousso, and, according to PaineWebber, Saphir's complaint does not allege any actual wrongdoing on PaineWebber's part, PaineWebber is entitled to indemnification from Rousso in the event that PaineWebber is liable to Saphir. Alternatively, PaineWebber asserts that, to the extent Saphir alleges Paine Webber is at fault, because the complaint alleges that Rousso is the primary wrongdoer and there is a great difference in the gravity of fault between them, equity imposes a duty of implied indemnity upon Rousso.

Indemnity permits a party legally liable to the plaintiff to shift the burden of liability and recover full reimbursement from another party. (*Trustees of Columbia Univ. in City of N.Y. v Mitchell/Giurgola Assocs.*, 109 AD2d 449, 452 [1st Dept 1985]). In the absence of an express agreement to indemnify, a court may imply an obligation to indemnify to prevent unjust enrichment, where the circumstances warrant it. (*Rosado v Proctor & Schwartz, Inc.*, 66 NY2d 21, 23-4 [1985]). Entitlement to implied indemnity requires: (1) that the proposed indemnitor owes a duty to the plaintiff that it breached by its wrongful conduct (*id.* at 24; *Insurance Co. of the State of Pennsylvania v HSBC Bank USA,* _ AD3d _, 2007 WL 473696 [1st Dept 2007];

Biondi v Beekman Hill House Apt. Corp., 257 AD2d 76, 83 [1st Dept 1999], *affd* 94 NY2d 659 [2000]; *City of New York v Lead Indus. Assn.*, 222 AD2d 119, 126 [1st Dept 1996]); or (2) the proposed indemnitor must owe a separate duty to the proposed indemnitee. (*Raquet v Braun*, 90 NY2d 177, 183 [1997]; *Bellevue S. Assocs. v HRH Const. Corp.*, 78 NY2d 282, 297, *rearg denied* 78 NY2d 1008 [1991]).

The classic case of implied indemnity arises where a party is liable vicariously or by imputation of law for another's wrongdoing. (*Trump Vil. Section 3, Inc. v New York State Hous. Fin. Agency*, 307 AD2d 891, 895 [1st Dept], *lv denied* 1 NY3d 504 [2003]; *17 Vista Fee Assocs. v Teachers Ins. and Annuity Assn. of Am.*, 259 AD2d 75, 79 [1st Dept 1999]). However, usually to hold a defendant liable under a theory of implied indemnification in these circumstances, the proposed indemnitee must not have participated in any of the wrongdoing. (*Id.*).

The Court of Appeals has recognized, however, that parties who are not free from personal fault can still invoke the doctrine of implied indemnity: (1) where the proposed indemnitee owes only a secondary duty to the injured plaintiff while the proposed indemnitor breached a primary duty, or (2) where there is a great disparity in the gravity of fault between the two tortfeasors. (*Mas v Two Bridges Assocs. by Nat. Kinney Corp.*, 75 NY2d 680, 690-91 [1990]; *Bellevue S. Assocs.*, 78 NY2d at 296; *see also* Prosser and Keeton, Torts § 51, at 342-43 [5th ed]). Under this theory, the proposed indemnitee must have engaged in mere passive negligence by failing to discover or remedy the wrongdoing, whereas the proposed indemnitor, by its active wrongdoing, actually created the danger to the plaintiff. (*Id.*; *City of New York*, 132 AD2d at 486).

For the reasons set forth below, the court discerns no legal theory under which

PaineWebber, if it is found liable to Saphir, could shift that burden to Rousso under the doctrine of implied indemnity.

Unlike the relationship between PaineWebber on the one hand and Merkel and Muro on the other, Rousso and PaineWebber did not have an employment relationship. However, Saphir does allege that PaineWebber held Rousso out as its agent for the sale and promotion of stock to the investing public, including Saphir. (Complaint, ¶¶ 129, 132). An agency relationship may engender vicarious liability. (*Teer v Queens Long Is. Med. Group, P.C.,* 303 AD2d 488, 489 [2d Dept 2003]). Apparent authority in an agency relationship depends upon a showing that the third party relied upon the misrepresentation of the agent because of some "misleading conduct on the part of the principal - not the agent." (*Indosuez Intl. Fin. B.V. v National Reserve Bank,* 98 NY2d 238, 245-46 [2002]). An agent cannot by his own acts imbue himself with apparent authority; rather, the existence of "apparent authority" depends upon the misleading conduct of the principal. (*Hallock v State,* 64 NY2d 224, 231 [1984]).

Thus, a determination that PaineWebber is vicariously liable to Saphir based upon Rousso's apparent agency relationship with PaineWebber necessarily requires a finding that PaineWebber engaged in misleading conduct. It follows then that PaineWebber is not entitled to indemnification from Rousso, because implied indemnity under these circumstances requires the absence of any wrongdoing on the part of the proposed indemnitee (*Trump Vil. Section 3, Inc.,* 307 AD2d at 895).

Some degree of fault on the part of the proposed indemnitee is permissible where the proposed indemnitee is otherwise merely passively or secondarily negligent. (*See Mas,* 75 NY2d at 690; *City of New York,* 132 AD2d at 486; *see also* Prosser and Keeton, Torts § 51, at 342-43

[5th ed]). However, here, a finding of apparent agency would render PaineWebber an active joint tortfeasor with fault of its own that contributed to Saphir's damages. A finding of actual fault, rather than mere passive or secondary wrongdoing, defeats a claim for implied indemnity. (*City of New York,* 132 AD2d at 486; *Wausau Bus. Ins. Co. v Turner Const. Co.*, 151 F Supp 2d 488, 492 [SD NY 2001]; *see also Bellevue S. Assocs.*, 78 NY2d at 296).

Additionally, PaineWebber's argument that the disparity of fault between it and Rousso is so great that equity entitles PaineWebber to indemnification from Rousso in the event that it is found liable to Saphir fails.

GOL § 15-108 precludes suits for contribution against settling tortfeasors by non-settling tortfeasors. The Court of Appeals has stated that GOL § 15-108 does not bar indemnification claims against settling tortfeasors as long as such claims "would not . . . necessitate an examination of relative degrees of fault," because "the statutory bar to contribution may not be circumvented by the simple expedient of calling the claim indemnification." (*Rosado,* 66 NY2d at 24-5).

Here, the only way to determine whether Rousso is primarily at fault and whether there is "a great difference in the gravity of the fault of the two tortfeasors" (*Mas,* 75 NY2d at 690), as PaineWebber contends, is for the fact-finder to assess Rousso's and PaineWebber's relative degrees of fault. Therefore, GOL § 15-108 bars the court from finding fault against Rousso, a settling tortfeasor. (*See Lewis v Rosenfeld,* 2002 WL 441185, *5 [SD NY 2002]).

In sum, because PaineWebber has not alleged any basis upon which it could shift the burden of Saphir's losses to Rousso if PaineWebber is found liable to Saphir, the court dismisses its third-party claim for indemnification against Rousso.

Accordingly, it is

ORDERED that the court grants Marc Rousso's motion to dismiss and dismisses the first cause of action of the third-party complaint in *UBS Financial Services Inc. v Marc A. Rousso, Jacques Heyer, and Heyer Management, S.A.*

The remaining parties shall participate in a conference call on April 17, 2007 at 12:00 noon to discuss discovery.

Dated: March 9, 2007

ENTER:

J.S.C.

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