

AIU Ins. Co. v The Robert Plan Corp.

2007 NY Slip Op 30299(U)

March 16, 2007

Supreme Court, New York County

Docket Number: 0603159

Judge: Bernard J. Fried

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

PRESENT: BERNARD J. FRIED
Justice

PART 60

AIU Insurance Company, et al.
Plaintiffs,

- v -

The Robert Plan Corp., et al.
Defendants,

FBEN

INDEX NO. 603159/2005

DATE _____

MOTION SEQ. NO. 016

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

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

This motion is decided in accordance with the accompanying memorandum decision.

FILED

MAR 19 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/16/07

[Signature]

J.S.C.

BERNARD J. FRIED
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FBEM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 60

-----X
AIU INSURANCE COMPANY, ET AL.,

Plaintiffs,

-against-

THE ROBERT PLAN CORP., ET AL.

Defendants.

INDEX NO.: 603159/2005

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MAR 19 2007
NEW YORK
COUNTY CLERK'S OFFICE

FRIED, J.:

Before me is a motion by Plaintiffs and Counterclaim-Defendants AIU Insurance Company and affiliated entities (“AIU”)¹ seeking a determination of rights to \$2.35 million in a certain escrow fund (the “fund”), which was received by Defendants and Counterclaim-Plaintiffs The Robert Plan Corporation, et al. (“TRP”) in connection with the settlement of separation litigation between TRP and OneBeacon Insurance (the “*OneBeacon* litigation”). TRP cross-moved, seeking a different division of the fund proceeds.

Essentially, the parties’ dispute turns on the interpretation of two provisions of a two-page agreement (the “assignment”) executed by the parties on December 8, 2004, in which AIU assigned to TRP all of AIU’s rights with respect to *OneBeacon*.

I have already issued several interim decisions in this case and will not reiterate many of the underlying facts, except to highlight those that are most important to the resolution of these motions.

1

The parties treat them as a single entity, and so shall I.

From 2002 through 2005, AIU paid TRP \$403,042.50 for its litigation expenses for the *OneBeacon* litigation, pursuant to two agreements with TRP: the Master Agreement in 2002–2004 and the Interim Agreement during 2005.² TRP spent \$37,669.41 in legal fees for the *OneBeacon* litigation in 2006.

Meanwhile, in anticipation of a possible acquisition of TRP by AIU in late 2004 (which never happened), the parties executed a Term Sheet, dated September 17, 2004. The Term Sheet provided in part that the “parties will share equally any proceeds (net of legal fees and other costs) in the OneBeacon and Perot litigations.” (Bronstein Aff. ¶ 5 (Aug. 16, 2006).)

On December 8, 2004, AIU and TRP executed a two-page agreement (the “assignment”), in which AIU assigned to TRP all of AIU’s rights with respect to *OneBeacon*. The first disputed provision is paragraph 2 of the assignment, which provides: “The Robert Plan Entities, jointly and severally, shall pay to the AIU entities 50% of the net proceeds of the Action. If there are no net proceeds, no payment shall be required.” The second provision in dispute is paragraph 3 of the assignment, which provides: “The Robert Plan Entities shall hold the AIU Entities harmless for any losses or costs related to or arising out of this Assignment.”

On October 22, 2004, (before the assignment was executed), the judge who presided over the *OneBeacon* litigation ordered further discovery. On January 6, 2005, (after the

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The Master Agreement provides in section 8.4 that AIU was to “fund” TRP’s “actual operating expenses,” which was defined to include certain “costs of defense and/or liability in connection with third-party claims.” The Interim Agreement likewise provides in paragraph 11 that AIU’s budget will include TRP’s legal fees in the *OneBeacon* litigation.

assignment had been executed), the *OneBeacon* court granted TRP leave to amend its complaint to include new allegations related to the assignment and to modify its damages request based on its new theory of damages, and permitted further discovery. OneBeacon subsequently served non-party discovery demands on AIU. These demands included interrogatories and 22 document demands. Beginning in early 2005, AIU incurred \$979,810.20 in responding to these non-party discovery demands.³

A court's role in interpreting a contract is "to ascertain the intention of the parties at the time they entered into the contract. If that intent is discernible from the plain meaning of the language of the contract, there is no need to look further. This may be so even if the contract is silent on the disputed issue." *Evans v. Famous Music Corp.*, 1 N.Y.3d 452, 458 (2004).

"Net proceeds"

The first disputed provision is paragraph 2 of the assignment, which provides: "The Robert Plan Entities, jointly and severally, shall pay to the AIU entities 50% of the net proceeds of the Action. If there are no net proceeds, no payment shall be required." AIU contends that paragraph 2 requires that the fund proceeds be used first to reimburse AIU and TRP for their respective litigation costs on behalf of TRP in the *OneBeacon* litigation, with the remainder divided equally between them. TRP, in turn, claims that the fund proceeds must be used first to reimburse the legal fees and expenses of TRP alone, with the remaining

3

These non-party discovery expenses, which AIU incurred beginning in 2005, are *separate from* and *in addition to* the \$403,042.50 in funds AIU expended to cover the litigation expenses of TRP, for which AIU seeks reimbursement pursuant to paragraph 2 of the assignment.

funds split equally between TRP and AIU.

The parties do not dispute that the term “net proceeds” ordinarily means the gross proceeds minus the transaction costs, and that in this case such transaction costs include attorneys’ fees and costs. The question is *whose* legal fees and costs are reimbursed. AIU says both parties’ fees and costs are reimbursed; TRP claims that only TRP’s are.

According to AIU’s reading: “net” means net. In support of its reading, AIU points out that, by the time the assignment was executed, AIU had funded all of the expenses of the *OneBeacon* litigation so far and the parties then expected AIU to continue to do so. Thus, AIU argues, it would be unreasonable to interpret “net,” as TRP urges, so as to reimburse TRP for its attorneys’ fees, but not to reimburse AIU.

I agree with AIU that nothing in paragraph 2 limits “net proceeds” to the proceeds “net” of TRP’s expenses alone. And the sentence that follows the initial “net proceeds” language – “[i]f there are no net proceeds, no payment shall be required” – simply says that 50% of zero is zero. It does not indicate one way or the other whether AIU is entitled to recover its legal expenses, since such recovery would take place prior to the distribution of “net proceeds.” I conclude that paragraph 2 refers to the “net proceeds” after both AIU and TRP are reimbursed for their legal fees and costs.

Nevertheless, TRP argues that any reimbursement of legal expenses to AIU must be limited to the expenses AIU accrued since the assignment was executed. TRP points out that AIU was contractually obligated under the Master Agreement to finance TRP’s legal expenses in the *OneBeacon* litigation; this payment was part of TRP’s consideration in entering into the Master Agreement. Most of AIU’s \$403,042.50 in expenses accrued before

the assignment was executed. Therefore, TRP reasons, the parties could not have intended the assignment to modify the arrangement in the Master Agreement that AIU would pay TRP's legal expenses in the *OneBeacon* litigation.

I disagree with TRP's interpretation of paragraph 2 in this respect as well. In the Master and Interim Agreements, TRP bargained for the payment of its legal expenses by AIU and received it – AIU paid TRP's legal expenses in the *OneBeacon* litigation from 2002 through 2005. In the assignment, however, TRP bargained for something quite different: in exchange for AIU's assignment of its "rights, title and interest in any claims for damages against the defendants" in that action, TRP agreed to pay AIU half of the "net proceeds" of that action. Paragraph 2 of the assignment does not effect a retroactive modification of the Master Agreement; nor does it compromise the consideration TRP received in the Master and Interim Agreements or undermine AIU's obligations under those agreements to pay for TRP's litigation expenses in the *OneBeacon* litigation. Rather, it represents an entirely new bargain with respect to entirely new matters. There is no reason not to read paragraph 2 to entitle AIU to recover the legal expenses it incurred both prior to the execution of the assignment and afterward.

Nonetheless, TRP maintains that paragraph 2 was drafted by AIU and must be read against AIU under the principle of *contra proferentem* and other rules of contract interpretation. But this principle, like the other rules governing the construction of ambiguous contracts, comes into play only if a provision is ambiguous. *Wallace v. 600 Partners Co.*, 86 N.Y.2d 543, 548 (1995); *Hugo Boss Fashions, Inc. v. Federal Ins. Co.*, 252 F.3d 608, 616 (2d Cir. 2001). Paragraph 2 is not ambiguous as to these issues.

Consequently, these rules of contract interpretation do not come into play, and I do not need to consult parol evidence.⁴

Therefore, I conclude that “net proceeds” can only be read to mean the proceeds “net” of the legal fees and costs of both TRP and AIU, including those incurred before the assignment was executed.⁵

Indemnification of Discovery Expenses

The second provision in dispute is paragraph 3 of the assignment, which provides: “The Robert Plan Entities shall hold the AIU Entities harmless for any losses or costs related to or arising out of this Assignment.” AIU claims that under paragraph 3, TRP is obligated to reimburse AIU for its \$979,810.20 in discovery expenses, including attorneys fees, which it incurred as a non-party in the *OneBeacon* litigation. Because these expenses exceed the proceeds from the fund to which TRP would otherwise have been entitled under paragraph 2, AIU believes it is entitled to the entire fund.

The issue is whether the \$979,810.20 in non-party discovery expenses incurred by AIU in the *OneBeacon* litigation were “related to or arising out of” the assignment.

The term “losses or costs” in this context clearly encompasses the counsel fees and costs that AIU incurred in litigation with a third party. The First Department has held that a similar “hold harmless” clause in a contract “clearly entitle[d]” the indemnitee to

4

TRP’s other objections as to whether “net” includes reimbursement of AIU’s expenses have been considered and found without merit.

5

That portion of TRP’s cross-motion seeking an order disqualifying certain of AIU’s attorneys from participating in any evidentiary hearing as to the meaning of paragraph 2 is moot, in light of the rest of my decision.

indemnification for the costs it incurred in defending an action by a third party. *Di Perna v. American Broadcasting Companies*, 200 A.D.2d 267, 269-70 (1st Dept. 1994). Nothing in the reasoning of *Di Perna* suggests that its holding should be limited to third-party actions to which the indemnitee is a party, rather than a non-party subject to discovery demands. The case on which TRP relies, *Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487 (1989), does not control this case; there the Court simply affirmed the rule that the prevailing party generally may not recover its legal fees from the losing party in a lawsuit, unless the parties have made their intent to alter that rule “unmistakably clear.” *Hooper*, 74 N.Y.2d at 492. This case would be like *Hooper* if AIU were trying to recover from TRP its counsel fees in prosecuting this motion. On the contrary, here, as in *Di Perna*, AIU is attempting to recover its legal fees in a separate lawsuit to which it was not a party. The First Department has not extended *Hooper*’s holding to indemnification of counsel fees in a third-party lawsuit, and neither will I. As TRP has pointed out in its motion papers, AIU has a legal duty to respond to third-party discovery, just as it must defend itself in a lawsuit. Paragraph 3 is broadly worded, and nothing in its plain language excludes non-party discovery expenses from the scope of the “hold harmless” provision. Consequently, I conclude that AIU’s reasonable non-party discovery expenses “related to or arising out of” the assignment, including counsel fees, are covered by the “hold harmless” provision in paragraph 3.

TRP has raised genuine questions, however, as to both the reasonableness of AIU’s \$979,810.20 in expenditures and whether all of these expenditures were “related to or arising out of” the two-page assignment. I will refer this matter to a special referee to hold an evidentiary hearing and report on these two limited questions. Furthermore, since the

ultimate division of the fund proceeds depends on the resolution of these questions, I will also refer to the referee the calculation of how much of the fund proceeds should be paid by TRP to AIU.

Accordingly, it is

ORDERED that AIU's motion to determine rights in the fund (Motion Sequence No. 16) is GRANTED IN PART and DENIED IN PART, and TRP's cross-motion is GRANTED IN PART and DENIED IN PART; and it is further

ORDERED that Motion Sequence No. 14 in its entirety is DENIED AS MOOT; and it is further

ORDERED that the following issues:

- (1) which of AIU's non-party discovery expenses after December 8, 2004 were "related to or arising out of" the assignment;
- (2) which of AIU's non-party discovery expenses after December 8, 2004 were reasonable; and
- (3) the calculation of how the fund proceeds should be divided, in accordance with this memorandum decision;


are hereby referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by C.P.L.R. § 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that, with respect to items (1) and (2) above, AIU shall submit to the Special Referee an itemized list of its non-party discovery expenses in the *OneBeacon*

litigation, with supporting documentation, and the parties shall submit to the Special Referee any other documentation that he or she requires; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Special Referee Clerk (Room 119) to arrange a date for the reference to a Special Referee.

DATED: 3/16/07



J.S.C.
BERNARD J. FRIED
J.S.C.

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