

**Herbst v Financial Sq. Partners L.P.**

2007 NY Slip Op 31455(U)

May 30, 2007

Supreme Court, New York County

Docket Number: 0601874/2006

Judge: Herman Cahn

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

DECEASED: **HERMAN CAHN**

PART 49

Index Number : 601874/2006

HERBST, EDWARD I.

vs

FINANCIAL SQUARE PARTNERS L.P.

Sequence Number : 002

SUMMARY JUDGMENT

**C**

INDEX NO. \_\_\_\_\_

MOTION DATE 2/1/07

MOTION SEQ. NO. 002

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

**FILED**  
JUN 05 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 5/30/07 Herbst \_\_\_\_\_

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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  
EDWARD HERBST,

Plaintiff,

Index No. 601874/06

-against-

FINANCIAL SQUARE PARTNERS LP  
f/d/a COWEN & CO,

Defendant.

**FILED**  
JUN 05 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

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**Herman Cahn, J.:**

In this action for contractual indemnification, Plaintiff Edward Herbst moves for summary judgment, CPLR 3212. For the reasons stated below, the motion is denied.

The complaint contains allegations that, in 1983, Herbst became employed with Cowen & Cowen (Cowen), a New York partnership engaged in the securities business. Herbst states that he became a limited partner in March of 1986, pursuant to a limited partnership agreement (Cowen Agreement) and a general partner in 1989.

The Cowen Agreement was amended in 1991 (Second Cowen Agreement) and again in 1994 (Third Cowen Agreement). Pursuant to Section 22(d) of the Third Cowen Agreement, Cowen agreed to indemnify Herbst for any liability incurred by him as a result of

his employment with Cowen. Section 22(e) required Herbst to provide notice to Cowen of a demand for indemnification with "reasonable promptness".<sup>1</sup> Upon receiving notice, Cowen was entitled to participate in or assume the defense of any such action or proceeding.

In 1998, non-party Societe Generale purchased the assets of Cowen and formed a new company, SG Cowen Securities Corporation. The purchase price was paid to a newly-formed entity, defendant Financial Square Partners, LP (FSP). Herbst and the other Cowen limited partners became limited partners of FSP pursuant to an Amended and Restated Agreement of Limited Partnership, dated June 30, 1998 (FSP Agreement). Herbst continued to be employed by SG Cowen.

Section 16(a) of the FSP Agreement stated that FSP was obligated to indemnify Herbst for any liability incurred by him as a result of his partnership in FSP:

The Partnership shall defend, indemnify, and save harmless to the full extent permitted by the [Revised Limited Partnership] Act or

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<sup>1</sup> Section 25 provided that any notices given pursuant to the Agreement were required to be in writing unless otherwise provided in the Agreement.

otherwise under New York law, any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the Partnership) by reason of the fact that such person is or was a Partner, officer, director, employee, attorney, accountant or agent of the Partnership or of the General Partner, or is or was serving at the request of the Partnership as a partner, officer, director, employee, attorney or agent of another partnership, corporation, joint venture, trust or other enterprise, from and against any and all losses or liabilities, (including, without limitation, all fees of attorneys, and other expenses and disbursements actually and reasonably incurred by such person in connection with such action, suit or proceeding) arising or accruing from the date of this Agreement.

Section 16(b) of the FSP Agreement stated that Herbst was required to provide "reasonably prompt" notice to FSP of a request for indemnification pursuant to Section 16(a):

If any action, suit or proceeding against or investigation or inquiry of such person is commenced, as to which such person proposes to demand such indemnification, such person will notify the Partnership with reasonable promptness.

Section 16(b) further provided that FSP was entitled to participate in or assume the defense of any such actions if it so chose.

Section 16(c) of the FSP Agreement stated that the indemnification provisions of the Third Cowen Agreement remained effective:

Nothing in the foregoing shall be deemed to add or derogate from any person's right of indemnification under the [Third Cowen Agreement] with respect to liabilities or losses accruing prior to the date of this Agreement.

However, no provision similar to Section 25 of the Third Cowen Agreement was included in the FSP Agreement (see fn. 1).

Herbst ended his employment with SG Cowen at some point in 1999. In June of 1999, Herbst, SG Cowen and FSP executed a Confidential Settlement Agreement, pursuant to which Herbst agreed that he would contribute, up to 45% of the settlement of claims brought by customers against SG Cowen relating to Herbst's employment by SG Cowen.

At different points in 1999, three former customers commenced arbitration proceedings against SG Cowen and Herbst, asserting claims for damages based on actions purportedly taken within the scope of Herbst's employment related to the

customers' accounts.<sup>2</sup> Herbst claims that he orally notified FSP of the arbitration proceedings "shortly after" they were commenced and requested indemnification. He does not specify the date when such notice was given.

In 2000, a fourth customer commenced an arbitration proceeding against SG Cowen and Herbst. Again, Herbst states that he orally notified FSP of this proceeding "shortly after it was commenced" and requested indemnification. Herbst also contends that he provided written notice in a letter dated December 3, 1999, although that letter does not mention any of the underlying proceedings for which he is now seeking indemnification but, instead, requests indemnifications for certain other proceedings. The letter does state that "[t]here are currently three other matters open."

Herbst alleges that he retained a law firm to represent him in the arbitration proceedings based upon a recommendation from FSP. He states that FSP also asked him to wait until the proceedings with the former customers (and any associated

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<sup>2</sup> The claims included breach of fiduciary duty, fraud, excessive trading and unauthorized trading, among others.

litigation between SG Cowen and Herbst for contribution) were resolved before seeking indemnification from FSP.

SG Cowen eventually settled the four arbitration proceedings. In 2002, it commenced an action seeking contribution from Herbst pursuant to the 1999 Settlement Agreement. In December of 2004, SG Cowen and Herbst reached a settlement agreement, whereby Herbst agreed to pay \$450,000 to SG Cowen.

Herbst requested indemnification from FSP by letter dated December 3, 2004. FSP requested more information about the claims for which Herbst sought indemnification. Herbst responded by letter dated February 8, 2005, which provided additional information and reiterated his request for indemnification. FSP refused the request for indemnification shortly thereafter.

Herbst states that he has contributed \$450,000 towards the settlement of all four claims. He also states that he spent \$261,675.08 in legal fees in the course of defending all four actions. He commenced this action in May of 2006, asserting a single claim for breach of contract, with respect to the Third

Cowen Agreement and/or the FSP Agreement. He now moves for summary judgment.

A party moving for summary judgment is required to make a prima facie showing that it is entitled to judgment as a matter of law, by providing sufficient evidence to eliminate any material issues of fact from the case. Winegrad v NYU Medical Center, 64 NY2d 851 [1985]; Grob v Kings Realty Associates, LLC, 4 AD3d 394 [2d Dept 2004]. The party opposing must then demonstrate the existence of a factual issue requiring a trial of the action. Zuckerman v City of New York, 49 NY2d 557, 560 [1980].

Herbst has not demonstrated that he is entitled to summary judgment. Among other things, issues of fact exist as to whether he provided sufficient and timely notice of his demand for indemnification as required by the Third Cowen Agreement and the FSP agreement.

As noted above, both agreements required Herbst to provide notice of the demand for indemnification with "reasonable promptness," in order to permit the partnership to participate in the underlying action if necessary. Notably, neither

agreement defines what constitutes either sufficient notice or reasonable promptness.

Initially, Herbst asserts that he provided oral notice of his indemnification demands after each action was commenced against him. However, FSP denies that any such demands were made. Thus, issues of fact exist as to whether such notice was provided, whether it would be sufficient under the agreements and whether such notice was timely.

Herbst also contends that he provided written notice in a letter dated December 3, 1999. However, that letter does not mention any of the underlying proceedings for which indemnification is now sought.

It is undisputed that Herbst requested indemnification by letter dated December 3, 2004. However, according to FSP, that letter was sent on the same day that the settlement became effective between Herbst and SG Cowen, whereby he agreed to pay \$450,000. Thus, it is not clear whether FSP was given sufficient opportunity to participate in the underlying actions or the 2004 settlement between Herbst and SG Cowen. As such, Herbst has not

demonstrated, as a matter of law, that he provided sufficient notice as required by the Third Cowen Agreement and/or the FSP agreement. Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied.

DATED: May 30, 2007

ENTER:

  
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J.S.C.

**FILED**  
JUN 05 2007  
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COUNTY CLERK'S OFFICE