

**Digital Broadcasting Corp. v Ladenburg, Thalman, & Co., Inc.**

2007 NY Slip Op 32593(U)

August 8, 2007

Supreme Court, New York County

Docket Number: 0117041/2005

Judge: Richard B. Lowe

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

PRESENT: LOWE  
Justice

PART 56

Digital Broadcasting Corp

INDEX NO. 117044/05

MOTION DATE 7/10/07

MOTION SEQ. NO. \_\_\_\_\_

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

- v -

Lubbers, Thomas C et al

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

FILED

AUG 21 2007

REVISION IS REQUIRED IN A CONFERENCE

Dated: 8/17/07

[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 56

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DIGITAL BROADCASTING CORP.,

Index No:117041/05

*Plaintiff*

- against -

**DECISION AND ORDER**

LADENBURG, THALMAN, & CO., INC.,  
SILVERMAN COLLURA & CHERNIS, P.C.,  
JONATHAN INTRATER and  
MARTIN LICHT,

*Defendants*

**FILED**

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AUG 21 2007

**RICHARD B. LOWE III, J:**

Plaintiff Digital Broadcasting Corp. (“DBC”) brings this action against Ladenburg, Thalman & Co., Inc (“Ladenburg”); Silverman Collura & Chernis, PC (“SCC”); Jonathan Intrater (“Intrater”); and Martin Licht (“Licht”) (collectively, “the Defendants”) for fraud, breach of fiduciary duty, breach of contract, breach of implied covenant of good faith, and aiding and abetting fraud. In the instant motion, defendant Ladenburg moves for partial summary judgment under CPLR 3212 on its counterclaim for the advancement of attorney’s fees. DBC opposes the motion, and cross-moves for judgment under CPLR 3212 holding that the same counterclaim’s subject matter is inapplicable to the instant action.

## BACKGROUND

The general facts of this matter were discussed in this Court's decision dated November 6, 2006 and shall not be repeated here, except to the extent necessary to decide this motion.

The instant action's genesis is the alleged breach of, and the Defendants' malfeasance associated with, a contract between DBC and Ladenburg. The contract, which governed the private placement of DBC's securities by investment-banker Ladenburg, contained an indemnification clause. Article III of the contract reads

[DBC] and Ladenburg hereby agree to the terms and conditions of the Indemnification Agreement attached hereto as Appendix A with the same force and effect as if such terms and conditions were set forth at length herein.

*(O'Brien Aff'd, Ex 2, page 2)*

Pursuant to the contract's Appendix A

[DBC] agrees to indemnify and hold Ladenburg and its affiliates. . .harmless from and against all losses, claims, damages, liabilities, costs or expenses, including those resulting from any threatened or pending litigation. . .whether or not Ladenburg or any such other Indemnified Person is a party to such. . .dispute arising out of any matter referred to in this Agreement.

This indemnity shall also include Ladenburg's and/or any such other indemnified person's reasonable attorney's. . .fees and out-of-pocket expenses incurred. . .

[H]owever. . .the indemnity herein set forth shall not apply to an Indemnified Person where a court of competent jurisdiction has made a final determination that such Indemnified Person acted in a grossly negligent manner or engaged in willful misconduct in the performance of the services hereunder which gave rise to the loss, claim, damage, liability, cost, or expense sought to be recovered hereunder (but pending any such final determination the indemnification and reimbursement provisions hereinabove set forth shall apply and the [DBC] shall perform its obligations hereunder to reimburse Ladenburg. . .for its. . .expenses. . .as they occur)

*(Id, Ex 2, Appendix A)*

In the instant action, Ladenburg asserts a counterclaim for a declaratory judgment that the

indemnification agreement cited, *supra*, is binding on the parties. Additionally, it alleges that DBC breached the contract because it refuses to reimburse Ladenburg for the legal fees the latter has incurred in defending this dispute. Ladenburg seeks summary judgment pursuant to CPLR 3212 in the instant motion, arguing that DBC must reimburse its legal fees as a matter of law. DBC opposes the motion and cross-moves under CPLR 3212 as well, arguing that the indemnification agreement is not applicable to a legal dispute between it and Ladenburg.

### DISCUSSION

To obtain summary judgment, the movant must establish its cause of action “sufficiently to warrant the court as a matter of law in directing judgment” in its favor (*CPLR 3212 [b]*), and it must “set forth evidence that there is no factual issue” requiring an adjudication on the facts (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). To defeat a summary judgment motion, the opposing party must “show facts sufficient to require a trial of any issue of fact” (*CPLR 3212 [b]*). Where the parties have plainly expressed their intent in writing, the meaning of the writing is to be determined as a matter of law on the basis of it alone. (*See, Chimart Assoc. v Paul*, 66 NY2d 570, 572 [1986].) “Clear and complete writings should generally be enforced according to their terms. . .” (*Collins v E-Magine, LLC*, 291 AD 2d 350 [1st Dept 2002].)

Here, the agreement plainly provides the following: DBC is to indemnify Ladenburg for any liabilities that may arise from the latter’s placement of the former’s securities. This indemnification also includes attorney-fee reimbursement, which DBC is required to do as Ladenburg incurs said expenses. If it is ultimately determined that Ladenburg acted intentionally or recklessly, DBC is not required to reimburse Ladenburg. However, the agreement is silent as to the fees already reimbursed up until the time a judgment is rendered.

The agreement, however, is not clear as to the type of suit to which it is applicable. While it pertains to suits arising out of the DBC-Ladenburg contract, it does not expressly state that DBC must pay Ladenburg's legal fees in connection with a suit against it. As is here, when the subject-matter contract is ambiguous, its meaning "must be construed most strongly against the party who prepared it. . ." (*Jacobson v Sassower*, 66 NY 2d 991 [1995].) Ladenburg is the agreement's drafter.

In order to interpret the meaning of an ambiguous indemnity agreement, the "words in a contract are to be construed to achieve the apparent purpose of the parties." (*Hooper Associates Ltd v AGS Computers, Inc.*, 74 NY 2d 487 [1989].) Here, Gary Nerlinger, DBC's Chief Executive Officer, attests that he did not discuss the indemnity agreement with Ladenburg. (*Nerlinger Aff'd at page 1*, ¶ 2) Rather, he read the agreement and interpreted it to mean that DBC would indemnify Ladenburg for any claims brought against the latter by third parties. (*Id.*) With the ambiguous language and the parties' different understandings, the intention that this agreement would encompass claims between the signatories is not manifest. (*See, Breed, Abbott, & Morgan v Hulko*, 139 AD 2d 71 [1<sup>st</sup> Dept 1988].) Accordingly, it cannot be construed to apply in the instant action.

Moreover, if the drafting-party used language "susceptible to third-party claims", the agreement will be interpreted to apply only to those claims. (*Hooper, supra.*) Conversely, if the wording used indeed reflects claims that may arise between the agreement's signatories, the indemnity would be applicable thereto. Here, none of the subjects covered by the indemnification are "unquivocally referable to claims between the parties themselves." (*Id.*) Rather, it discusses pending investigations or proceedings, which DBC reasonably argues refers to investigations conducted by regulatory institutions such as the U.S. Securities and Exchange Commission or the New York Stock Exchange. Additionally, it indemnifies Ladenburg even if it is not a party to a

dispute. This sounds in third-party claims as well: a reasonable interpretation is that if a third party commenced an action against DBC with respect to its private placement, the latter would not hold Ladenburg liable.<sup>1</sup>

Finally, “indemnification agreements are unenforceable as violative of public policy [when] they purport to indemnify a party for damages flowing from the intentional causation of injury.” (*Austro v Niagara Mohawk Power Corp*, 66 NY 2d 674 [1985].) While the agreement does contain a *provisio* that fees are not to be paid if a court determines the indemnified party acted intentionally, reimbursements are nevertheless to be made on an ongoing basis prior to such determination. Here, all of DBC’s claims against Ladenburg are intentional torts. If Ladenburg’s argument was correct, and the agreement is germane to the instant action, it would nevertheless fail because of New York’s public-policy.<sup>2</sup>

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<sup>1</sup> In reply, Ladenburg raises the issue for the first time that the instant action indeed involves a third-party claim because Air Cable, a Virginia-based company, is involved in the case’s factual background. But Air Cable is not a party to the case. Ladenburg’s newly-raised argument is without merit.

<sup>2</sup> In its reply papers, Ladenburg objects to DBC’s cross-motion’s timeliness, and seeks its dismissal because it is procedurally defective. The attorney who was to appear on DBC’s behalf experienced a family-medical emergency, and needed to attend to her familiar duties. This Court accepts Counsel’s reasons, and will not deny the motion on procedural grounds.

**CONCLUSION**

For the foregoing reasons, it is hereby


ORDERED that Ladcburg's motion for partial summary judgment is denied; and it is further

ORDERED that DBC's cross-motion for partial summary judgment is granted.

This shall constitute this Court's decision and order.

**Date:** August 7, 2007

Enter



~~RICHARD B. LOWE III~~  
Richard B. Lowe III, J.S.C.

**FILED**

AUG 21 2007

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MARIETTA, OHIO