

Idearc Media Corp. v E & H Auto Services, Inc.

2007 NY Slip Op 34223(U)

December 11, 2007

Supreme Court, Queens County

Docket Number: 0003212/2007

Judge: David Elliot

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Plaintiff Idearc Media Corp., formerly known as Verizon Directories Corp., commenced the within action against defendant E & H Auto Services Corp. (E & H Auto) to recover the sum of \$34,042.48, together with interest, for advertising published in the yellow page directories, pursuant to an agreement entered into between July 30, 2003 and December 22, 2004. The advertisements were published in a January 2004 Queens directory, and E & H Auto allegedly failed to pay the monthly advertising fees for the period of July through December 2004.

E & H Auto operated an auto repair business. In its answer to the complaint, E & H Auto asserted that its obligations to the plaintiff were assumed by Brian Goldberg, Wayne Mohammed and Fidel Flores, pursuant to "A Purchase, Assignment, Assumption and Indemnification Agreement" dated July 12, 2004. E & H Auto commenced a third-party action against Goldberg, Mohammed and Flores, for contractual indemnification and attorney's fees, in which it alleges that the third-party defendants agreed to indemnify it for claims in connection with the failure by the third-party defendants to be solely responsible for the payment of the yellow pages advertisements.

Third-party defendant Flores asserts in his answer, as affirmative defenses, that the he was not advised that he was assuming the obligations of E & H Auto, that he did not have an opportunity to review the agreement with counsel of his choice, and that the agreement does not specifically provide that the third-party defendants are responsible for existing yellow page advertisements. Flores also interposed a cross claim against Mohammed and Goldberg for common law or contractual indemnification.

Third-party defendant Mohammed interposed in his answer seven affirmative defenses and an answer to the cross claim.

E & H Auto now seeks an order granting partial summary judgment on the issue of liability against third-party defendants on its claim for contractual indemnification and reasonable attorney's fees. Third-party defendant Fidel Flores has withdrawn his cross motion to the extent that it seeks to serve and file an amended answer. Therefore, this cross motion shall be considered solely in opposition to the defendant/third-party plaintiff's motion.

It is well-settled that a party seeking summary judgment "must make a prima facie showing of entitlement as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Ayotte v Gervasio,

81 NY2d 1062, 1063 [1993]; see Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). A prima facie showing shifts the burden to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material question of fact (see Alvarez v Prospect Hosp., supra).

E & H Auto has not submitted any evidence that it served Mr. Goldberg with process. It is noted that the court's computer records contain scanned copies of affidavits of service of process on Mr. Mohammed and Mr. Flores. No such records exist as regards Mr. Goldberg. Therefore, as E & H Auto has not established that the court has personal jurisdiction over Brian Goldberg, that branch of the motion which seeks partial summary judgment against this third-party defendant is denied.

The court finds that Goldberg, Mohammed and Flores, pursuant to the July 12, 2004 agreement, purchased the assets of E & H Auto, including three telephone numbers and agreed to "assume, effective as of the date hereof, and shall satisfy or perform, as they come due, those contracts and unfulfilled obligations of the Business now existing as of the date hereof, including all obligations for warranty service to retail customers of E & H, and all obligations to pay for telephone service". The agreement specifically exempted the purchasers from any liability for E & H Auto's obligations with respect to the payment of taxes. Although the agreement does not set forth a purchase price, the recited consideration, inter alia, provided that:

"4.(c) Grantees [Goldberg, Mohammed and Flores] shall be solely responsible for payment for any 'yellow pages' advertisements and shall ensure that the names of Grantors [E & H Auto and its sole shareholder Edwin Hershberg] are removed from such advertisements as soon as possible".

(d) Grantees will indemnify and hold Grantors... harmless from all actions, causes of action, suits, sums, agreements, damages, judgments, claims and demands whatsoever, including reasonable attorney's fees in connection with the use of the equipment hereby purchased, the contracts and obligations of the Business, and the contracts and obligations of Grantees' new business, including but not limited to all obligations for warranty service to retail customers of the Business and Grantees' new business and all obligations to pay for telephone service using the above numbers. Notwithstanding anything herein to the contrary, Grantors agree that Grantees shall not be liable for any taxes related to the Business and shall hold Grantees harmless

from any such tax liabilities.

5. Grantees hereby agree to indemnify and hold Grantors harmless from, against and in respect of all losses, costs, damages, obligations, claims and expenses, (including, without limitation, reasonable attorney's fees) arising out of or in connection with the failure of Grantees to perform or comply with this Agreement and the obligations assumed by Grantees herein. THIS AGREEMENT AND ASSUMPTION OF LIABILITIES SET FORTH HEREIN SHALL BE BINDING UPON GRANTEES JOINTLY AND SEVERALLY AND SHALL INURE TO THE BENEFIT OF THE GRANTORS, THEIR SUCCESSORS AND ASSIGNS."

The court thus finds that the E & H Auto has established, prima facie, that the third-party defendants agreed to pay for the existing obligation for the yellow pages advertisements and agreed to indemnify it for claims relating to the payment for the yellow pages advertisements in exchange for acquiring E & H Auto's assets. Mr. Mohammed's claim that the agreement is not supported by valuable consideration, therefore, is rejected. In addition, contrary to Mr. Mohammed's assertion, Mr. Hershberg was not required to sign the agreement in his individual capacity, as the only seller was the corporation.

In opposition to the third-party plaintiff's prima facie showing, Mr. Flores' assertion of fraud in the inducement is unpersuasive. Mr. Flores claims that prior to executing the agreement, Mr. Hershberg stated that the corporation did not have any debts. It is noted that Mr. Flores' also concedes that he agreed to be responsible for the yellow pages advertisements, but claims that he was unaware of the amount of the debt. These claims are inherently contradictory and also contradict the express terms of the subject agreement. Where, as here, there is a "meaningful" conflict between an express provision in a written contract and a prior alleged oral representation, the conflict negates a claim of a reasonable reliance upon the oral representation (Bango v Naughton, 184 AD2d 961, 963 [1992]; see also, Citibank v Plapinger, 66 NY2d 90, 95 [1985]; Stone v Schulz, 231 AD2d 707, 708 [1996]). Thus, Mr. Flores will be unable to establish that he reasonably relied on the alleged oral representations and cannot establish a defense of fraudulent inducement (see, Stone v Schulz, supra).

Mr. Flores' admitted failure to carefully read the agreement before signing it does not raise a triable issue of fact. A party who signs a document is conclusively bound by its terms absent a valid excuse for having failed to read it (see Da Silva v Musso, 53 NY2d 543, 550-551 [1981]; Fleet Capital Leasing/Global Vendor Fin.

v Angiuli Motors, Inc., 15 AD3d 535, 536 [2005]; Guerra v Astoria Generating Co., L.P., 8 AD3d 617, 618 [2004]; Daniel Gale Assoc. v Hillcrest Estates, 283 AD2d 386, 387 [2001]). No such excuse has been proffered here. Finally, the court finds that contrary to Flores' contention, E & H Auto had no duty under the terms of the agreement to mitigate damages.

The fact that neither Flores nor Mohammed consulted an attorney prior to executing the contract does not raise a triable issue of fact as they do not claim that the seller acted in any manner which prevented them from consulting an attorney of their choice.

In view of the foregoing, defendant/third-party plaintiff E & H Auto's motion for partial summary judgment on the issue of liability on its claims for contractual indemnification, including reasonable attorney's fees, against third-party defendants Wayne Mohammed and Fidel Flores, is granted. The issue of damages shall be determined at trial immediately following the trial of the main action. That branch of defendant/third-party plaintiff E & H Auto's motion for partial summary judgment against third-party defendant Brian Goldberg is denied. Third-party defendant Flores' cross motion is denied as moot.

Dated: December 11, 2007

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J.S.C.