Harte v Association for the Advancement of the Blind and Retarded, Inc.
2007 NY Slip Op 34362(U)
February 20, 2007
Supreme Court, New York County
Docket Number: 0116617/2005
Judge: Emily Jane Goodman
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SCANNED ON 2/21/2007

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

PRESENT: EMILY JANE GOODMAN, Justice

PART 17

Index Number : 116617/2005

HARTE, SAM

vs

ADVANCEMENT OF BLIND

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

; 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 as attached

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

Dated: 2/20/07

J.S.C.

EMILY JANE GOODMAN

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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SAM HARTE, TIMOTHY FERGUSON, SCOTT LOCKWOOD and LYNN EDMONDS, as TRUSTEES OF THE NEW YORK HEALTH CARE FACILITIES WORKERS' COMPENSATION TRUST,

Plaintiffs,

-against-

Index No.: 116617/05

ASSOCIATION FOR THE ADVANCEMENT OF THE BLIND AND RETARDED, INC.,

DECISION

Defendant.

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EMILY GOODMAN, J:

In this action, plaintiffs are trustees of the New York Health Care Facilities Workers' Compensation Trust (the Trust), a group self-insurance trust organized pursuant to the Workers' Compensation Law of New York, that provides workers' compensation insurance coverage to its members, who are employers in the healthcare industry. In their complaint, plaintiffs seek to recover from defendant Association for the Advancement of the Blind and Retarded, Inc. (AABR), an organization that provides services to the blind and retarded, AABR's pro-rata share of an assessment in the amount of $55,994.30, for the duration when AABR was a member of the Trust. AABR, in its answer, generally denies the allegations of the complaint and asserts various defenses, including the statute of limitations defense.

Plaintiffs move this court, pursuant to CPLR 3212, for entry of summary judgment in favor of the Trust. For the reasons stated below, the relief sought by plaintiffs' is granted to the extent set forth herein.

Background

Pursuant to certain Trust documents between the parties, including the Trust Participation Certificates and the Workers' Compensation and Employers' Liability Self-Insurance Guide, which collectively are akin to a policy of self-insurance, AABR became a member of the Trust for the period of April 29, 1998 through April 29, 2001. Based on the record provided by the parties in this case, pursuant to a notice dated February 5, 2001, AABR's membership was terminated by the Trust, effective April 29, 2001.

In 2004, New York Workers' Compensation Board (the Board) audited the Trust. By letter dated October 19, 2004, the Board advised the trustees that the Trust was underfunded, and directed the trustees to develop a corrective plan to ensure the Trust's long-term viability and limit its members' exposure to unexpected financial liability. On May 27, 2005, the trustees proposed a plan to meet the directives of the Board. The plan proposed to fund the deficit, by levying a special assessment against all members of the Trust, in an amount equal to one half of the Trust's deficit for the years 1997-2003. By letter dated June 1, 2005, the Board approved the proposed plan and assessment.

In a letter dated June 30, 2005, the Trust informed AABR that all active and terminated members of the Trust, from its inception in 1997 to 2003, were being assessed for their pro-rata share of the Trust's total deficit during the period of their respective membership in the Trust. Enclosed in the letter was an invoice to AABR, indicating that its pro-rata share of the assessment was $55,994.30, and the amount was to be paid in 36 monthly installments, with the first payment due August 10, 2005.

When AABR did not make any of the installment payments, plaintiffs commenced the instant action on behalf of the Trust, seeking to recover the assessment against AABR.

Standards Governing Summary Judgment Motion

In setting forth the standards for granting or denying a motion for summary judgment, pursuant to CPLR 3212, the Court of Appeals noted, in *Alvarez v Prospect Hospital* (68 NY2d 320, 324 [1986]), the following:

> As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [internal citations omitted].

Adhering to the guidance of the Court of Appeals, the lower courts uniformly scrutinize motions for summary judgment, as well as the facts and circumstances of each case, to determine whether relief may be granted. *See, e.g., Giandana v Providence Rest Nursing Home,* 32 AD3d 126, 148 (1st Dept 2006) (because entry of summary judgment "deprives the litigant of his day in court, it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues") (citations omitted); *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997) (in considering a summary judgment motion, "evidence should be analyzed in the light most favorable to the party opposing the motion") (citations omitted). However, general allegations of a conclusory nature that are unsupported by competent evidence are insufficient to defeat a motion for summary judgment. *Alvarez,* 68 NY2d at 324-325.

Summary Judgment Motion Should Be Granted

Plaintiffs' claim against defendant AABR with respect to the assessment is based on several grounds, including, the Bylaws of the Trust, the Indemnity Agreement between the Trust and AABR, and the New York Workers' Compensation Law.

With respect to the Trust's Bylaws, plaintiffs assert that AARB is obligated to pay the assessment because Section 4 of the Bylaws states that "the Member agrees to pay in full ... all premiums, dues or assessments, at the start of their coverage

year and for every coverage year thereafter."[1]

AARB contends, however, that Section 4 does not address assessments made after termination of a member's participation, and that it only applies to current, but not former, members of the Trust. AARB also contends that, because Section 7 of the Bylaws states that a terminated member "shall remain liable for any and all dues and assessments applicable during any period during their membership," this language implies that a member is liable only for assessments made during its membership but unpaid at the time of membership termination, and not for assessments made after membership termination. Thus, AABR argues that it is not liable for the assessment at issue, because its membership was terminated in April 2001, more than four years prior to the Board's approval of the Trust's proposed assessment in June 2005.

AARB argument is unpersuasive, particularly in view of the Indemnity Agreement between the Trust and AARB, effective as of March 17, 1998. More specifically, Article III, Section 4 of the Indemnity Agreement provides, in relevant part, that:

> If the assets of the Trust are at any time actuarially determined to be insufficient for the Trust to discharge its legal liabilities ... the Trustees shall make up the deficiency by the levy of an assessment upon Members pro-rated in accordance with the rules and

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[1]Members are defined in the Indemnity Agreement as "all parties who executed this Agreement or the same or similar Agreement as Members of the Trust." Accordingly, the term Member is not limited by the duration of membership.

> regulations adopted by the Trustees ... Each Member covenants and agrees to make payment of a deficiency assessment, pro-rated in accordance with the rules and regulations adopted by the Trustees, for any Trust year, or part thereof, that the Member participated in the Trust, whether or not still a member in good standing.

Thus, under the Indemnity Agreement, it is clear that all members of the Trust, whether current or former, are required to pay deficiency assessment "for any Trust year" that such member participated, "whether or not still a member in good standing," so long as the Trust's assets are insufficient to discharge its liabilities. In this case, the Board determined in October 2004 that the Trust was underfunded, and directed the trustees to develop a corrective plan to address the problem. In response, the trustees proposed a plan, including the assessment, that was approved by the Board in June 2005. Hence, under the Indemnity Agreement, AABR is contractually required to pay the assessment, which was determined in accordance with rules and regulations adopted by the trustees and approved by the Board, even though AARB is no longer a current member of the Trust.

Further, the Workers' Compensation Law of New York (WCL) also supports the trustee's position. Specifically, the statute provides, in relevant part, that:

> Under [a self-insurance plan for employers,] the group shall assume the liability of all the employers within the group and pay all compensation for which the said employers are liable ... An employer participating in group

> self-insurance shall not be relieved from the liability for compensation prescribed by this chapter except by the payment thereof by the group self-insurer or by himself.

WCL, § 50, 3-a (2) and (3). The foregoing is emphasized in a letter issued in April 2006 by the Board, a copy of which is annexed to the motion, wherein the Board stated:

> Pursuant to WCL § 50 (3-a), employers that have participated in a group trust, including the NYHCF Trust, are jointly and severally liable for all of the workers' compensation obligations incurred by the trust during the period of the employer's membership in the trust. This liability is evidenced by the indemnity agreement executed by each member and on file with this office. An employer is not relieved of those liabilities until they are paid ... It is important to recognize that while the NYHCF Trust is being dissolved,[2] there still exists a significant deficit that must continue to be addressed ... Employers will be expected to honor their joint and several liability obligation as the deficit continues to be managed.

Accordingly, based on the Indemnity Agreement, the Bylaws, and the WCL, AABR is contractually and statutorily liable for the assessment, which represents its pro-rata share of the workers' compensation obligations or liabilities incurred by the Trust on behalf of its members during the period when AARB was a member.

Notwithstanding the foregoing, AARB argues that, even if the trustees have a valid claim, a portion of the claim is time-barred to the extent that it seeks to recover any assessment that

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[2] The Trust was dissolved by the Board in July 2006.

is more than six years old, the limitations period applicable to a breach of contract claim under CPLR 213 (2). Specifically, AARB contends that, since the instant action was commenced on November 30, 2005, any assessment with respect to AARB's first policy year (April 29, 1998 to April 29, 1999), and half of the second policy year, is barred by the limitations period. AARB analogizes the trustee's claim to a claim under a demand promissory note. AARB relies upon, among others, the following cases for the proposition that, similar to a claim for payment of a demand note that accrues when the note is executed (not when the demand is made), the trustees' right to levy an assessment accrued when the under-funding occurred, which, AARB contends, happened in 1998. *See Phoenix Acquisition Corp. v Compcare, Inc.*, 81 NY2d 138 (1993); *Sewell v Swift*, 151 AD 584 (1st Dept 1912). Hence, AABR argues that the trustees' right to levy an assessment "was complete when the underfunding occurred," and they could not extend the limitation periods by "waiting to make the assessment" and "deferring the demand." AABR Brief, p. 5.

These arguments are without merit. Notably, while AARB asserts that the underfunding happened in 1998, it also asserts that, since the Trust was not found to be underfunded until three years after AABR ceased to be a member, it "strongly suggests that the financial circumstances which caused the underfunding and assessment did not arise until after AABR had left the

Trust." AABR Brief, p. 4. These assertions are contradictory.

Moreover, under the Indemnity Agreement, members of the Trust, such as AABR, are jointly and severally liable to the Trust, and they covenanted to assume and discharge, by payment, any award entered by the Board against any member, or any award or obligation of the Trust for which it may become obligated to pay in respect of any Trust year. Therefore, pursuant to the Indemnity Agreement, the Trust can seek indemnity from AABR, as to any obligation for which AABR and the Trust may become jointly and severally liable under New York Workers' Compensation Law, including the making up of an underfunded deficiency, by levying and paying an assessment. See NYCRR § 317.9 (b) (7) (when a group self-insurer is deemed underfunded, the Board can require the group insurer to immediately levy an assessment upon the group members to make up the deficiency).

It is black letter law that a breach of contract cause of action accrues at the time of the breach. *Ely-Cruikshank Co., Inc. v Bank of Montreal*, 81 NY2d 399 (1993). It is also "well settled that a cause of action based upon a contract of indemnification does not arise until liability is incurred by way of actual payment." *Varo, Inc. v Alvis PLC*, 261 AD2d 262, 265 (1st Dept 1999), quoting, *Travelers Indemnity Co. v LLJV Development Corp.*, 227 AD2d 151, 154 (1st Dept 1996). Further, it has been stated that an action accrues "when all the facts

necessary to sustain the cause of action have occurred, so that a party could obtain relief in court." *Vigilant Ins. Company v Housing Authority of the City of El Paso*, 87 NY2d 36, 43 (1995).

In this case, on October 1, 2004, the Board directed the trustees to develop a plan to cure the underfunding, and they responded by proposing a plan whereby an assessment would be levied against all Trust members. The plan and the assessment were approved by the Board on June 1, 2005, and an invoice reflecting AARB's pro-rata share of the assessment was sent to AARB on June 30, 2005, with the first installment payment due on August 15, 2005. Notably, it would not have been possible for the Trust to commence an action prior to imposing the assessment on the Trust Members. The instant action was commenced on November 30, 2005, based on AARB's failure to pay the first installment on August 15, 2005. AARB does not dispute that a breach of contract claim has a limitations period of six years. Because this action is timely commenced, no part of the assessment is barred by the statute of limitations.

Finally, AARB argues that, even if it is liable for paying the entire assessment of $55,994.30, the trustees cannot require AARB to pay the entire sum now. The trustees contend that AARB's obligation to pay the 36 monthly installments was accelerated when it failed to make the first installment on August 15, 2005. This court agrees that, because neither the Indemnity Agreement

nor the invoice accompanying the assessment letter to AARB provide for acceleration of the entire assessment, the Trust is only entitled to those installment payments that would have already been due at the date of entry of this decision and order.

Conclusion

Plaintiffs are entitled to a judgment against defendant with respect to those monthly installment payments that are due as of the date of this decision, plus any interest, as specified in plaintiffs' invoice to defendant. Plaintiffs are directed to settle an order and judgment.

This Constitutes the Decision and Order of the Court.

Dated: February 20, 2007

ENTER:

J.S.C.

EMILY JANE GOODMAN