

**Staff USA, Inc. v Texport Fabrics Corp.**

2008 NY Slip Op 30260(U)

January 25, 2008

Supreme Court, New York County

Docket Number: 0604289/2006

Judge: Marcy S. Friedman

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

MARCY S. FRIEDMAN

PRESENT: \_\_\_\_\_

PART 57

Justice

Staff USA

INDEX NO. 604289/06

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

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

- v -

Texport Fabrics Corp.

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

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

**FILED**

JAN 30 2008

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER** NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 1/25/08

Marcy Friedman  
**MARCYS. FRIEDMAN** S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

\_\_\_\_\_ x  
 STAFF USA, INC.,

*Plaintiff,*

- against -

Index No.: 604289/06

TEXPORT FABRICS CORP.,

*Defendant.*

DECISION/ORDER

This is an action to reform a lease, brought by plaintiff-tenant Staff USA, Inc. (“Staff USA”) based on the allegation that an early termination provision was omitted from the lease as the result of a scrivener’s error. Defendant Texport Fabric Corp. (“Texport”) moves to disqualify plaintiff’s law firm, Dreier LLP (“Dreier”).<sup>1</sup> Staff USA moves to dismiss the first counterclaim asserted by Texport against it for attorney’s fees in defending the instant action.

Defendant seeks disqualification of the Dreier firm on the ground that attorneys from the firm will be required to give testimony in the action. In opposition, plaintiff submits the affidavit of Steven Gursky, a Dreier partner, in which he attests that he was the only attorney at Dreier involved in negotiation or drafting of the lease; that no other Dreier attorney would therefore be a necessary witness on behalf of either party; and that he will not serve as a litigator in this matter, which will be handled by Ira Sacks, another Dreier partner. In response, defendant fails to show that any Dreier attorney other than Mr. Gursky may be a necessary witness.

Under the Code of Professional Conduct, “[a] lawyer shall not act, or accept employment that contemplates the lawyer’s acting, as an advocate on issues of fact before any tribunal if the

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<sup>1</sup> The remaining branch of defendant’s motion to compel plaintiff to preserve certain documents was withdrawn pursuant to stipulation dated March 13, 2007.

lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client,” subject to exceptions not relevant here. (DR 5-102[a] [22 NYCRR § 1200.21[a]].) However, as a result of 1990 amendments to the Code, a law firm is permitted to continue representing a client even if one or more of its attorneys will be required to testify on behalf of its client. (See Talvy v American Red Cross in Greater New York, 205 AD2d 143, 152 [1<sup>st</sup> Dept 1994], affd 87 NY2d 826 [1995] on op below; Matter of Owen & Mandolfo, Inc. v Davidoff of Geneva, Inc., 197 AD2d 370 [1<sup>st</sup> Dept 1993], lv denied 83 NY2d 751 [1994]. Accord Davin v JMAM, LLC, 27 AD3d 371 [1<sup>st</sup> Dept 2006].) By the terms of the amendments, the firm may not accept employment if “it is obvious that [a lawyer in the firm] may be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony would or might be prejudicial to the client.” (See DR 5-102[b], [d] [22 NYCRR §§ 1200.21[b], [d]]. See also e.g. Broadwhite Assocs. v Truong, 237 AD2d 162 [1<sup>st</sup> Dept 1997]; Martinez v Suozzi, 186 AD2d 378 [1<sup>st</sup> Dept 1992]; Fairview at Old Westfield, L.P. v European American Bank, 186 AD2d 238 [2d Dept 1992].)

Disqualification may nevertheless run to the entire firm under the “advocate witness” rule, under which the test is “the necessity of the attorney’s testimony and the implications of that testimony for the adversarial process.” (Price v Price, 289 AD2d 11, 13 [1<sup>st</sup> Dept 2001], citing S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp., 69 NY2d 437 [1987].) Thus, in order to determine whether disqualification of the firm is required, “some exploration of the nature of the testimony likely to be required from members of the firm is in order.” (Price, 289 AD2d at 13.)

In Price, the court required disqualification of a matrimonial firm where the plaintiff

sought to set aside a prenuptial agreement negotiated by an attorney at the firm, on the ground that the agreement was procured by fraud, duress, coercion, and misrepresentation. The court reasoned that “[t]he same firm charged with the obligation to protect plaintiff’s interests in the negotiations culminating in the signing of the prenuptial agreement will be put in the untenable position of arguing that it abjectly failed in its efforts to protect those interests. The material consideration is not the credibility of a particular lawyer but the general reputation of the firm. No matter which member of the firm appears in the divorce action on plaintiff’s behalf, it will be necessary to attack the adequacy of the representation provided to her during the course of negotiations in order to overcome the presumption that her interests were protected.” (Id. at 14.) The court then concluded that disqualification must run to the entire firm, not merely the individual lawyer who had represented plaintiff in the negotiations, because “any attempt to denigrate the capabilities of the firm by one of its members is apt to be regarded as less than credible, to plaintiff’s detriment.” (Id. at 50.)

Similarly, in Fernandes v Jamron (9 AD3d 379 [2d Dept 2004]), a case involving allegations of fraud and legal malpractice in connection with a conveyance of real property, the law firm was disqualified where the attorney who represented the plaintiff in the sale was an essential witness in the action.

In the instant case, in contrast, Staff USA does not argue that the Dreier firm committed malpractice in the negotiation of the lease, and neither the Dreier firm’s substantive advice to its client nor its reputation is in issue. Rather, as evidenced by the allegations of the complaint and the affidavit of Steven Gursky, the Dreier partner who represented plaintiff in the negotiation, his testimony will be that there was a clerical error in attaching a rider to the lease. Under these

circumstances, defendant fails to meet its “heavy burden” of demonstrating that Mr. Gursky’s testimony would be “so adverse to the factual assertions or account of events offered on behalf of the client as to warrant” disqualification of the firm. (See Martinez, 186 AD2d at 379. Accord Broadwhite Assocs., 237 AD2d at 163.) The court accordingly holds that disqualification of the entire firm is not required.

The court now turns to plaintiff’s motion to dismiss defendant’s counterclaim for attorney’s fees. Defendant contends, and plaintiff denies, that the parties’ lease provides for attorney’s fees in an action for reformation of contract.

It is well settled that “[w]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances.” (Hooper Assocs., Ltd. v AGS Computers, Inc., 74 NY2d 487, 491-492 [1989] [internal citations omitted]. See also Duane Reade v Highpoint Assocs. IX, LLC, 36 AD3d 496 [1<sup>st</sup> Dept 2007].) In the case of attorney’s fees, it is further settled that “[i]nasmuch as a promise by one party to a contract to indemnify the other for attorney’s fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney’s fees, the court should not infer a party’s intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise.” (Hooper Assocs., Ltd., 74 NY2d at 492.)

In asserting its counterclaim, Texport relies upon Articles 8<sup>2</sup> and 52<sup>3</sup> of the parties' lease. In opposition, Staff USA contends that the subject provisions do not apply to the instant action between the parties, but rather to actions arising out of negligence by Staff USA or its default in the performance of the lease, or to actions brought by third-parties based on negligence.

Here, contrary to Texport's contention, the lease provisions upon which it relies do not provide for its indemnification from Staff USA for the defense of this action brought by Staff USA against Texport. An indemnification clause may provide for attorney's fees for a defense to an action between the parties. (See Soundview Shopping Ctr. v Port Bay Assocs., 230 AD2d 729 [2d Dept 1996] [reformation action]; Breed, Abbott & Morgan v Hulko, 139 AD2d 71 [1<sup>st</sup>

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<sup>2</sup> Article 8 provides in pertinent part:

Tenant shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which Owner shall not be reimbursed by insurance, including reasonable attorney's fees paid, suffered or incurred as a result of any breach by Tenant [or] Tenant's agents \* \* \* of any covenant or condition of this lease, or the carelessness, negligence or improper conduct of the Tenant [or] Tenant's agents \* \* \*. In case any action or proceeding is brought against Owner by reason of any such claim, Tenant, upon written notice from Owner, will, at Tenant's expense, resist or defend such action or proceeding by counsel approved by Owner in writing, such approval not to be unreasonably withheld.

<sup>3</sup> Article 52 provides in pertinent part:

Tenant agrees to indemnify and save Landlord harmless against and from any and all claims by or on behalf of any person or persons, firm or firms, corporation or corporations, arising from any work or thing or circumstance or occurrence whatsoever done by or on behalf of Tenant, in or about the Demised Premises, except for claims arising out of or related to Landlord's negligence or willful misconduct, and will further indemnify and save Landlord harmless against and from any and all claims arising from any breach or default on the part of Tenant in the performance of any covenant or agreement on the part of Tenant to be performed, pursuant to the terms of this Lease, or arising from any act or negligence of Tenant, or any of its agents \* \* \* and from and against all costs, reasonable counsel fees \* \* \* incurred in or about any such claim or action or proceeding brought thereon; and in case any action or proceeding be brought against Landlord by reason of any such claim, Tenant, upon notice from Landlord, covenants to resist or defend, at Tenant's expense, such action or proceeding by counsel appointed by Tenant's insurance counsel or other counsel reasonably satisfactorily [sic] to Landlord.

Dept 1988] [defense of action under contract].) Here, however, the indemnification provision "is typical of those which contemplate reimbursement when the indemnitee is required to pay damages on a third-party claim." (Hooper Assocs., Ltd., 74 NY2d at 492. See also Duane Reade, 36 AD3d at 497.)

Texport's further contention that it is entitled to indemnification under the lease merely because the Dreier firm was Staff USA's "agent" is based on a patent misreading of the lease. Article 8 provides for indemnification of Texport not for all acts of Staff USA's agents, but only acts that involve a default by the tenant or its agents in the performance of the lease or negligence. Dreier's representation of Staff USA in negotiating the lease is not such an act.

The court has considered Texport's remaining contentions and finds them without merit.

It is accordingly hereby

ORDERED that the branch of defendant's motion for disqualification is denied; and it is further

**FILED**

JAN 30 2008

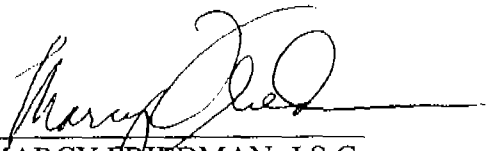
ORDERED that plaintiff Staff USA's motion is granted to the extent that defendant's first counterclaim for attorney's fees is dismissed; and it is further

NEW YORK  
COUNTY CLERK'S OFFICE

ORDERED that the parties are directed to appear for a preliminary conference in Part 57 (80 Centre Street, Room 328) on Thursday, February 28, 2008, at 11:00 a.m.

This constitutes the decision and order of the court.

Dated: New York, New York  
January 25, 2008

  
MARCY FRIEDMAN, J.S.C.