

Zachariou v Manios

2008 NY Slip Op 31279(U)

April 21, 2008

Supreme Court, New York County

Docket Number: 0601196/2006

Judge: Richard B. Lowe

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

PRESENT: HON. RICHARD B. LOWE, III
Justice

PART 56

Index Number : 601196/2006
ZACHARIOU, EVANGELIA MANIOS
vs
MANIOS, VASSILIOS
Sequence Number : 003
DISMISS COMPLAINT

INDEX NO. _____
MOTION DATE 11/15/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

C

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

FILED
MAY 05 2008

COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 4/21/08

HON. RICHARD B. LOWE, III

J.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: IAS PART 56

-----X
EVANGELIA MANIOS ZACHARIOU,

Plaintiff,

-against-

Index No.
601196/06

VASSILIOS MANIOS, CHARALAMBOS V. SIOUFAS and
CONSTANTINOS G. EMMANUEL,

Defendants.

-----X

RICHARD B. LOWE, III, J.:

FILED
MAY 05 2008
COUNTY CLERK'S OFFICE
NEW YORK

In this motion (Sequence Number 003), plaintiff Evangelia Manios Zachariou (EMZ) moves to dismiss the counterclaims of defendants Vassilios Manios (VM) and Charalambos V. Sioufas (Sioufas). Sioufas cross-moves upon renewal, pursuant to CPLR 2221(e), or, alternatively, upon summary judgment, pursuant to CPLR 3212(b), to dismiss the complaint as against him.

Upon oral argument on November 15, 2007, this court stayed discovery pending the already perfected appeal of its prior decision, in which the court dismissed the second through eighth causes of action of the complaint. See Decision, Zachariou v Manios, Index No. 601196/06, filed May 7, 2007 (hereinafter, the Prior Order). At that same time, the court also accepted an open-court stipulation to the dismissal of the complaint as against defendant Sioufas. A written stipulation dismissing EMZ's claims against Sioufas, and Sioufas's counterclaims against EMZ, all with prejudice, dated as of February 28, 2008, has been filed. As such, Sioufas's cross motion is moot.

Background

The background of this action is discussed in the Prior Order, and will be reiterated herein only to the extent necessary.

This action arises between VM and EMZ over business interests and worldwide assets remaining after the death of their brother, Dimitrios Manios, in 1995. In 1999, VM and EMZ entered into an agreement in Greece to share, and settle their respective claims to their deceased brother's assets.

As of March 12, 2002, the parties had decided that VM and EMZ would each own their part of the assets independently of the other. On March 13, 2002, VM and EMZ executed their understanding in a series of agreements. The umbrella agreement (herein, the London Agreement), among other transactions: (i) acknowledged prior agreements governing the partial distribution of assets; (ii) named herein-dismissed defendant Sioufas as "Trustee" (for the London Agreement); (iii) included a "Letter of Instructions to Trustee" (Trustee Letter) obligating VM and EMZ to pay certain of Sioufas's expenses; (iv) agreed to the transfer of EMZ's interest in non-party Brock Corporation (Brock), which was owned by VM and EMZ jointly since March 30, 1999, to VM; and (v) arranged for the execution of a "US Agreement," which governed the disposition of US assets represented by Brock shares.

Brock owned all the shares of non-party Changole International B.V., which owned all the shares of Prestige Holdings Inc. (Prestige), which, in turn, owned all the shares of Decana Inc. (Decana), a New York corporation. Prestige also owned all shares of non-parties Ashford on the Bayou Inc. and 2100 WLS Inc., two Texas corporations.

The complaint and the answer both allege that since the execution of the US Agreement,

Spyros Contogouris, the former manager of Prestige and its subsidiaries, wrongly received assets transferred from those companies. Prestige, Decana, and the Texas corporations (herein, collectively, the US Holdings) all brought a series of suits to recover the assets (the US Actions).

Upon the Prior Order, the second through eighth cause of action were dismissed. The remaining cause of action claims breach of the US Agreement because VM failed to: (i) comply with requests to provide full access to the employees, books, and records relating to the US Holdings, as required under the US Agreement; (ii) cause the US Holdings to pursue all available causes of action against third parties for monies owed; and (iii) cause the US Holdings to be held in trust for EMZ and VM pending completion of their obligations under the US Agreement.

According to the answer, neither the US Holdings nor the Trustee had sufficient funds to pursue the US Actions. As a result, VM paid the legal fees and expenses associated with the US Actions. VM thus brings counterclaims for: (i) breach of contract due to EMZ's failure to pay half the legal fees and expenses associated with the US Actions; (ii) unjust enrichment because EMZ is entitled to 50%, net of legal fees and expenses, of any funds recovered through the US Actions, while VM has paid the legal fees and expenses already; (iii) contractual and common-law indemnification for the legal fees and expenses; (iv) a declaration that the Agreements either require EMZ to pay half of the legal fees and expenses of the US Actions, or, alternatively, that VM has no obligation to pay such fees.

The Trustee Letter provided that “[Sioufas] shall use all reasonable efforts to procure collection from all sources available of monies payable to either VM or EMZ pursuant to the US Agreement and the London Agreement.” Trustee Letter, ¶12.

The US Agreement provided, in turn, that VM and Prestige will take all steps necessary

to cause Prestige (US Agreement, ¶17) to “use all reasonable efforts to bring action against [parties receiving wrongfully transferred assets, and] any recovery in such action, net of expenses incurred (receipts in respect of which shall have been produced to VM and EMZ) in prosecuting shall be paid to Trustee to be distributed for the equal benefit of VM and EMZ pursuant to the terms of the London Agreement.” US Agreement, ¶13.

Discussion

Motion to Dismiss Counterclaims

Breach of Contract/Declaration (1st and 4th Counterclaims)

The essence of the breach of contract counterclaim is that EMZ had an obligation to pay for half of the legal fees and expenses associated with the US Actions and failed to do so.

In the US Agreement, the court finds no obligation, nor has VM offered any indication of an obligation, to the effect that VM and EMZ agreed to share expenses for the US Actions. The only putative obligation of this nature has been directly gleaned from the Trustee Letter (see ¶17 [“(VM and EMZ) shall each pay one-half (½) of the reasonable fees of the Trustee for your services as Trustee ...”]), which, as noted in the Prior Order, is committed to the jurisdiction of, and to be interpreted by, the Greek courts. See Prior Order, at 12.

Indeed, with respect to the responsibility of the parties to pay for legal fees and expenses, VM himself argues that “[n]one of the agreements between [EMZ and VM] specifically address whether [VM or EMZ] is responsible for advancing the cost of pursuing [the US Actions.]” Opposition Memo, at 3. VM goes on to explain that, in his view, “the obligation to pursue these claims falls only on the U.S. Corporations, not [VM.]” Id. at 4.

Ironically, despite his assertion that he was under no obligation to pursue the US Actions,

VM now seeks to impose his alleged voluntary election to pursue the US Actions on EMZ.

In any event, to the extent that VM actually had such obligations, the US Agreement limits such obligation to “reasonable efforts to bring [the US Actions].” US Agreement, ¶13; see also Trustee Letter, ¶12 (Trustee shall use all “reasonable efforts to procure collection from all sources available of all monies payable to either VM or EMZ pursuant to the US Agreement ...”).

Here, VM seeks half of some US\$11 million spent in legal fees and expenses pursuing assets of a declared value of US\$13 million. See London Agreement, ¶4.1 (“EMZ hereby sells and transfers to VM her entire 50% shareholding in BROCK CORPORATION ... for a price of US\$6,500,000 representing in substance 50% of the value of the building owned by Decana Inc. of New York ...”). Whether such expenditure is “reasonable” is open to question.

However, that question is left to the sound discretion of the courts of Greece. In this regard, the London Agreement, which, along with the Trustee Letter, serves as the only source of EMZ’s alleged contractual obligation, states that it is “subject to Greek law and any dispute hereunder is subject to the jurisdiction of the Courts of Athens, Greece. The Parties hereto waive any right under any applicable law to challenge the validity of this Agreement or of the Existing Agreements before any jurisdiction.” London Agreement, ¶¶26, 27; see also Trustee Letter, ¶¶19-20 (same, except designated jurisdiction is the “Courts of Piraeus, Greece”).

To the extent that EMZ has any contractual obligation to pay half of the expenses incurred by VM in pursuit of the US Actions, that obligation arises under the London Agreement and the Trustee Letter, which both commit determination of the extent of the obligation to the courts of Greece. The counterclaim for breach of contract is dismissed.

Likewise, any declaration as to the existence of an obligation, the reasonableness of

Trustee expenses, and/or the amounts due pursuant to those obligations, is also committed to those same fora. As such, the counterclaim for a declaration is also dismissed.

Unjust Enrichment (2nd Counterclaim)

The second counterclaim alleges that VM is entitled to recover from EMZ for unjust enrichment because EMZ is entitled to 50%, net of legal fees and expenses, of any funds recovered through the US Actions, while VM has paid the legal fees already.

“The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered Generally, courts will look to see if a benefit has been conferred on the defendant under mistake of fact or law, if the benefit still remains with the defendant, if there has been otherwise a change of position by the defendant, and whether the defendant's conduct was tortious or fraudulent.” Paramount Film Dist. Corp. v State of New York, 30 NY2d 415 (1972), cert denied 414 US 829 (1973) (citations omitted); see also Baron v Pfizer, 42 AD3d 627 (3rd Dept 2007).

Here, VM simply proposes that EMZ will benefit, in the future, to VM's detriment. There is nothing upon which to base a claim for unjust enrichment because EMZ has neither received, nor “retained” anything. VM's expenditures on legal fees in the US Action may be either beneficial or for naught. Only after VM confers a benefit on EMZ may he recover for unjust enrichment. Compare McCall v Frampton, 81 AD2d 607 (2nd Dept 1981) (claims to future earnings not based on legally recognized service cannot be supported on the theory of unjust enrichment, and must be dismissed). As such, the claim for unjust enrichment is premature at best.

In any event, VM has failed to submit any documentary evidence, or any affidavits (not even his own) substantiating that he paid any legal fees. See Andersen ex rel. Andersen, Weinroth & Co. v Weinroth, 48 AD3d 121 (1st Dept 2007) (in order to recover for unjust enrichment, plaintiff must offer evidence concerning the value of the benefit conferred). Moreover, the only calculable demand for payment from EMZ is one from Sioufas, whose counterclaims have been dismissed with prejudice, demanding payment of US\$135,000 for the costs of his defense of actions against him in New York. The only other demand for payment of legal fees came from Mr. Constantinos Emmanuel, against whom the complaint was dismissed under the Prior Order, and that demand asked for no specific amount.

Tellingly, VM's answer leaves the date of demand for payment of half of the alleged US\$11 million in legal fees and expenses blank. See Answer, ¶45. As such, the counterclaim for unjust enrichment is not even supported by allegations.

The unjust enrichment claim also suffers from being duplicative of the breach of contract claim. First, to the extent that EMZ recovers a benefit from the activities of the Trustee in pursuing the US Actions, that benefit is to be computed, in the first instance, by the mechanism described in the London Agreement. Second, the Trustee Letter seems to offer EMZ such a benefit from activities and assets of the US Holdings only after payment of "reasonable fees of the Trustee ... including but not limited to attorneys' fees." See Trustee Letter, ¶17. As such, the Trustee will, in all normal instances, be paid before the conferral of any benefit upon EMZ, so that a cause of action for unjust enrichment ought not ever arise.

In addition, that same provision of the Trustee Letter states that neither VM nor EMZ "shall be required to indemnify [Sioufas] for any such ... expense arising as a result of [Sioufas's]

willful misconduct.” Id. One of the main aspects of EMZ’s complaint was that there was fraud and/or breach of fiduciary duty by Sioufas and prior defendant, Constantinos Emmanuel. Those causes of action have been dismissed as within the purview of Greek courts. As a cause of action for unjust enrichment might be directly obviated by the result of any such inquiries, this matter too, belongs in those courts.

Contractual and Common-Law Indemnification (3rd Counterclaim)

In the third counterclaim, VM asserts that EMZ is “required to indemnify or contribute to the payment of the [legal] fees and expenses of the [US Actions].” Manios Answer, ¶63. The apparent source of this alleged requirement is the Trustee Letter, which provides that EMZ and VM shall

reimburse and indemnify [Sioufas] for ... attorney fees ... incurred by you in connection with the performance of [Sioufas’s] duties and obligations under [the Trustee Letter], the London Agreement and the US Agreement, as well as reasonable costs and expenses of defending against any claim or liability under [the Trustee Letter] or the London Agreement or the US Agreement; provided, that notwithstanding the foregoing, neither [EMZ nor VM] shall be required to indemnify [Sioufas] for any such loss, liability, cost or expense arising as a result of [Sioufas’s] willful misconduct.

Trustee Letter, ¶17.

As noted above, the Trustee Letter is subject to the jurisdiction of Greek courts. As such, EMZ’s putative contractual obligation to indemnify Sioufas is within the purview of those courts, and not properly enforced in this court.

Common-law, or implied, indemnity is a restitution concept. In this cause of action, VM also seeks, via operation of law, to shift half of the legal fees and expenses to EMZ. Implied indemnification is applicable where failure to require such indemnification would result in the unjust enrichment of one party at the expense of the other. Rosado v Proctor & Schwartz, 106

AD2d 27 (1st Dept 1984), aff'd 66 NY2d 21 (1985). As VM has not established unjust enrichment of any sort, a determination as to common-law indemnification is inappropriate.

Moreover, implied indemnification does not apply outside of a contractual relationship, such as the Trustee Letter, unless there is a specific pleading of some extra-contractual obligation. Service Sign Erectors Co. v Allied Outdoor Advertising, 175 AD2d 761 (1st Dept 1991). VM has not established any extra-contractual agreements or implied agreements with EMZ.

Finally, as claims for common-law indemnity are based in faultless vicarious liability, a party that has participated in wrongdoing may not avail itself of the doctrine. Dormitory Authority of State of N.Y. v Scott, 160 AD2d 179 (1st Dept 1990). Here, EMZ alleges wrongdoing on the part of VM and Sioufas; it would be highly improper for this court to entertain a claim for common-law indemnity, while relegating the question of wrongdoing, upon which the claim may rely, to another court. For purposes of judicial efficiency, the matter of common-law indemnification should be determined by Greek courts as well.

The third counterclaim for contractual and common-law indemnification is dismissed.

Conclusion

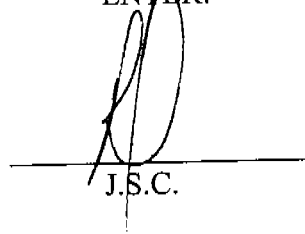
Accordingly, it is hereby

ORDERED that the motion sequence number 003 of plaintiff Evangelia Manios Zachariou to dismiss the counterclaims in the answer of defendant Vassilios Manios is granted; and it is further

ORDERED that the action in all other respects continues.

Dated: April 21, 2008

ENTER:



J.S.C.

HON. RICHARD B. LUYVE, III

FILED
MAY 05 2008
COUNTY CLERK'S OFFICE
NEW YORK