

Snyder v Travel Yesterday Inc.

2008 NY Slip Op 32379(U)

July 28, 2008

Supreme Court, New York County

Docket Number: 0105407/2007

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

Snyder, Robert

INDEX NO.

105407/07

MOTION DATE

2/4/08

MOTION SEQ. NO.

001

MOTION CAL. NO.

Travel Yesterday

The following papers, numbered 1 to _____ were read on this 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

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
AUG 28 2008

COUNTY CLERK'S OFFICE
NEW YORK

HON. RICHARD B. LOWE, III

Dated:

7/28/08

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
ROBERT SNYDER,

Plaintiff,

Index No.
105407/07

-against-

TRAVEL YESTERDAY INCORPORATED, d/b/a
FISCHER TRAVEL ENTERPRISES,

Defendant.

-----X
TRAVEL YESTERDAY INCORPORATED, d/b/a
FISCHER TRAVEL ENTERPRISES,

Third-Party Plaintiff, Third Party

-against

IMPULSIVE ENTERPRISES, THE SACKS GROUP
YACHTING PROFESSIONALS, INC., HAND FRIED
and BCR YACHTS,

Third-Party Defendants.

-----X
Richard B. Lowe, III, J.:

Third-party defendants Impulsive Enterprises, Hank Freid s/h/a Hand Fried (Freid), and The Sacks Group Yachting Professionals, Inc. (the Sacks Group) move for an order: (a) pursuant to CPLR 7503, for dismissal or a stay of the third-party action, or, alternatively, (b) pursuant to CPLR 3211 (a) (8), dismissing the third-party action as against the Sacks Group on the ground of lack of personal jurisdiction, and (c) pursuant to CPLR 3211 (a) (1), (3) and (7), dismissing all of the causes of action in the third-party complaint. Third-party defendant BCR Yachts has not yet been served, and thus is not one of the movants.

Index No.
590984/07

FILED

AUG 28 2008

COUNTY CLERK'S OFFICE
NEW YORK

Background

Impulsive Enterprises, as owner, plaintiff Robert Snyder (Snyder), as charterer, the Sacks Group, as broker/stakeholder, and BCR Yachts, as broker, entered into a May 9, 2006 M.Y.B.A. Charter Agreement (the Agreement), pursuant to which Snyder agreed to charter a yacht named the Impulsive, which was owned by Impulsive Enterprises. The period of the charter was from August 2, 2006 to August 9, 2006, for a charter fee of \$70,000, plus an advanced provisioning allowance of \$30,000 and a fuel fee of \$5,120. Impulsive Enterprises agreed to deliver the boat to Snyder at the port of delivery in Rome, Italy on August 2, 2006. The movants claim that, although the boat was at the port of delivery in Rome, Italy on August 2, 2006, Snyder refused to accept delivery on that date.

Snyder states that, in May 2006, he engaged defendant/third-party plaintiff Travel Yesterday Inc., d/b/a Fischer Travel Enterprises (Fischer) to arrange a Mediterranean vacation for him, his wife and several guests. Under the terms of the arrangements made by Fischer, the group was to fly to Rome, board the Impulsive on August 2, 2006, cruise for a week, and return to Rome on August 9, at which time they would fly back to New York. Snyder states that the cost of the vacation, which he paid in advance, was \$101,260, which included Fischer's fee of \$10,000. Snyder believes that Fischer also received a fee of approximately \$5,200 from BCR Yachts and/or the Sacks Group.

According to Snyder, upon his arrival in Rome, the captain of the Impulsive informed him that, due to inclement weather, he would be late in delivering the boat to Snyder in Rome. Snyder alleges that, after further delays, the captain suggested delivery to Capri instead of Rome. Snyder states, however, that the Impulsive was not delivered

to him at either location on August 2, 2006, or at any time within the first 48 hours of the scheduled charter period.

Pursuant to the Agreement, if the Impulsive's owner failed to deliver the boat to the charterer within a certain period of time due to inclement weather, the charterer could treat the Agreement as terminated, and would then be entitled to receive a return of the full amount of payments made, without interest.

On April 23, 2007, Snyder commenced the main action against Fischer, which sets forth two claims: one alleging breach of contract, and the other for money had and received, based on Fischer's receipt of the funds at issue. On or about October 29, 2007, Fischer commenced the third-party action, which contains four causes of action, sounding in breach of the Agreement, unjust enrichment, indemnification based on the

alleged negligent conduct of the movants, and contribution based on the movants' alleged negligent conduct.

The movants maintain that there is no basis for Snyder's breach of contract claim against Fischer in the main action in the absence of any privity under the Agreement.

The movants contend that, to the extent that Snyder has any claims, they are against the movants, and are subject to arbitration. The movants believe that Snyder, acting in concert with Fischer, intentionally omitted claims against the movants in the main action because the Agreement, which provides for mandatory arbitration, precludes such claims in this court. They assert that the main action was commenced in an improper attempt to circumvent the arbitration clause, so that Snyder could try to obtain the relief he seeks without arbitrating his claims.

Snyder states that he has a meritorious cause of action against Fischer, the party he dealt with directly and with which he is most familiar. He argues that his claims against Fischer are separate and apart from whatever unasserted claims he may have against the movants. Snyder states that the two causes of action he brings against Fischer do not mention the Agreement or the movants. He explains that the first cause of action is for breach of a separate agreement between Snyder and Fischer, whereby Fischer agreed to arrange a charter yacht for Snyder's vacation, in exchange for which Snyder paid Fischer \$101,620.

In addition to the monies that were to be paid out by Fischer to the movants for the charter fee, Snyder paid Fischer \$10,000 as its service fee. Thus, Snyder maintains that the contract between him and Fischer is a separate agreement, capable of enforcement without reference to the Agreement between Snyder and the movants.

Snyder explains that he need not sue each and every party who might be responsible for his damages. He states that the difficulties in locating foreign entities for service of process and in enforcing judgments in other jurisdictions often lead a plaintiff to focus on defendants against whom a plaintiff can most reasonably expect to recover.

Enforceability of the Arbitration Clause

The movants assert that the third-party action should be dismissed or stayed because it is subject to arbitration in London under the laws of England.

Clause 20 of the Agreement states, in part, that:

any dispute in connection with the interpretation and fulfillment of this Agreement shall be decided by arbitration in London and in accordance with the laws of England. The dispute shall be referred to a single Arbitrator to be appointed by the parties hereto. If the parties cannot agree upon the appointment of a single Arbitrator, the dispute shall be settled by

three Arbitrators, each party appointing one Arbitrator, the third being appointed by the current President of the Mediterranean Yacht Brokers Association or the American Yacht Charter Association.

The movants state that, in the third-party action, Fischer seeks money damages purportedly based on a breach of the Agreement, even though this forum is improper because Fischer's claims are subject to arbitration. The movants argue that, although Fischer attempts to style several of its claims on theories other than breach of contract, all of the allegations relate to the rights and obligations of the parties to the Agreement and the movants' alleged breach of their obligations. The movants argue that the third-party action should be dismissed or, at a minimum, stayed, pursuant to CPLR 7503.

Fischer contends that its claims are not subject to arbitration under the Agreement because it is not a party thereto. The movants respond that, contrary to Fischer's assertions, the inquiry regarding arbitration of its claims does not end simply because Fischer is not a party to the Agreement. Clause 20 provides that "any dispute in connection with the interpretation" of the Agreement will be decided by arbitration. According to the movants, those terms should be construed broadly to determine whether there is a relationship between the subject matter of the dispute and the general subject matter of the Agreement.

This court finds that the arbitration provision set forth in Clause 20 of the Agreement does not apply to the claims in the third-party action. New York has a strong public policy in favor of arbitration where the parties have agreed to arbitrate their disputes. (*Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 49 [1997]). In the instant action, however, Fischer is not a party that agreed to arbitrate any dispute it might

have with the movants, and thus, the provision does not apply to Fischer. (*Matter of Schneidman (Martin)*, 136 AD2d 481, 482 [1st Dept 1988]) (stating that “[a]rbitration is a creature of contract and only parties who have expressly agreed to an arbitration agreement can be compelled to arbitrate”). A party will only be compelled to arbitrate its disputes if it expressly agreed to do so, and “[t]he agreement must be clear, explicit and unequivocal and must not depend upon implication or subtlety.” *Matter of Waldron (Goddess)*, 61 NY2d 181, 183-84 [1984]) (internal citations omitted).

Thus, that part of the instant motion that seeks to dismiss or stay the third-party action pursuant to CPLR 7503 is denied.

Alternatively, the movants maintain that the court should: (a) dismiss the third-party action as against the Sacks Group, pursuant to CPLR 3211 (a) (8), on the ground of lack of personal jurisdiction; (b) dismiss the first and second causes of action, sounding in breach of contract and unjust enrichment, on the ground that Fischer lacks standing; (c) dismiss the first cause of action as against Freid, because he executed the Agreement solely in his corporate capacity as president of Impulsive Enterprises; and (d) dismiss the third and fourth causes of action, sounding in indemnification and contribution, on the ground that the claims are duplicative of the alleged breach of contract claim and they improperly seek recovery of pecuniary damages.

Standing

The movants argue that Fischer witnessed Snyder’s signature, but is not a party to the Agreement, and therefore lacks standing to assert a breach of contract claim pertaining thereto. They contend that Fischer, a non-signatory, attempts to step into the shoes of Snyder in order to recover for an alleged breach of the Agreement. Thus, the

movants maintain that the first cause of action should be dismissed on the ground of lack of standing.

Fischer maintains that it has privity with the movants to seek recovery on its contract claim because it paid them pursuant to the Agreement and it is a third-party beneficiary of the Agreement. Fischer argues that brokers who are entitled to a commission based on a broker-arranged agreement are third-party beneficiaries of the agreement unless it expressly provides otherwise. Fischer contends that it is clearly a third-party beneficiary of the Agreement, which Fischer arranged between Snyder and the movants with the knowledge of those parties. The movants argue, however, that Fischer lacks standing to assert a breach of contract claim because it is an incidental, not an intended, beneficiary of the Agreement.

It is undisputed that Fischer is not a signatory to the Agreement. As such, it only has standing to bring a breach of contract claim under the Agreement if it is a third-party beneficiary thereto. (See *Parker & Waichman v Napoli*, 29 AD3d 396, 398-99 [1st Dept. 2006]).

“A non-party may sue for breach of contract only if it is an intended, and not a mere incidental, beneficiary, and even then, even if not mentioned as a party to the contract, the parties’ intent to benefit the third party must be apparent from the face of the contract.” (*LaSalle Natl. Bank v Ernst & Young*, 285 AD2d 101, 108 [1st Dept 2001]). The Agreement does not provide any evidence of the parties’ intent to benefit Fischer. Thus, Fischer is at best an incidental, as opposed to an intended, beneficiary of the Agreement.

“A party asserting rights as a third-party beneficiary must establish ‘(1) the

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existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost.” (*State of Cal. Pub. Employees’ Retirement Sys. v Shearman & Sterling*, 95 NY2d 427, 434-35 (2000), quoting *Burns Jackson Summit Miller & Spitzer v Lindner*, 59 NY2d 314, 336 [1983]).

Fischer maintains that the contract was intended for his benefit, but an indication of that is nowhere to be found in the Agreement. Furthermore, Fischer cites to two cases indicating that brokers may be intended third-party beneficiaries. See *Condren, Walker & Co., Inc. v Wolf*, 19 AD3d 151 (1st Dept 2005); *Edward S. Gordon Co. v Blodnick, Schultz & Abramowitz*, 150 AD2d 212 [1st Dept 1989]). In both of those cases, however, the brokers and the fees due to them were specifically identified in the underlying agreements at issue. Furthermore, the brokers in those two cases were suing for their broker’s fees.

In the instant action, by contrast, Fischer is not identified in the Agreement as a broker, but rather as a contact for Snyder and as a witness to Snyder’s signature. Also, the Agreement does not contain any reference to, or provision for, payment of a commission to Fischer. Furthermore, significantly, Fischer does not seek payment of any brokers’ or agents’ fees that it claims are due to it by movants. Instead, Fischer seeks a refund of the full charter fee paid by Snyder to the movants. Thus, Fischer’s first cause of action is dismissed as against the movants on the ground of lack of standing.

Breach of Contract as to Freid

In light of the dismissal of the first cause of action as against the movants, the

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court need not separately address that part of the instant motion that argues that the breach of contract claim should be dismissed as against Freid.

Unjust Enrichment

The movants maintain that the second cause of action, sounding in unjust enrichment, should be dismissed because Fischer lacks standing to assert such a claim. They argue that the claim fails because Fischer has not alleged that it conferred a benefit upon any of the movants for which it was entitled to compensation.

Fischer maintains that it has standing to pursue the unjust enrichment claim. According to Fischer, in order to satisfy the elements of such a claim, he must show that the movants were enriched at his expense and that “it is against equity and good conscience to permit [the movants] to retain what is sought to be recovered’.” (*Citibank,*

N.A. v Walker, 12 AD3d 480, 481 [2d Dept 2004], quoting *Paramount Film Distr. Corp. v State of New York*, 30 NY2d 415, 421 [1972]). Fischer states that the movants have

been enriched in the amount of \$96,120, that Fischer paid that amount to them, and that they did not provide Snyder with the yacht rental for which they were paid. Fischer

argues that, although the funds originated with Snyder, Snyder made a payment of \$101,620 to Fischer, and he now sues Fischer seeking to recover that payment. Fischer contends that, if Snyder succeeds, the movants should be required to return to Fischer the \$96,120 benefit it conferred upon them.

The second cause of action is dismissed. “To state a cause of action for unjust enrichment, a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor.” (*Nakaruma v Fujii*, 253 AD2d 387, 390 [1st Dept 1998]). Movants did receive

the benefit of payment, but, whether that payment is considered to be received by Snyder or by Fischer, the claim is nonetheless insufficient, because there are no allegations that the movants were obligated to compensate Fischer in any manner. Thus, Fischer's allegations are not adequate to support a claim for unjust enrichment.

Contribution

Fischer concedes that the fourth cause of action, sounding in contribution, should be dismissed, based on the holding of the Court of Appeals in *Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 26 (1987), which held that "purely economic loss resulting from a breach of contract does not constitute 'injury to property' within the meaning of New York's contribution statute [CPLR 1401]."

Indemnification

As to the third cause of action, sounding in indemnification, the movants contend that it fails because Fischer, as Snyder's travel agent, has not alleged that the movants owed any duty of care to Fischer. They further argue that, in New York, the remedy of indemnification is not available for pecuniary damages, as opposed to personal injury or property damages, where, as here, such damages arise out of an alleged breach of contract.

Fischer argues, however, that a claim for indemnity can be brought for economic losses resulting from a breach of contract, and that the Court of Appeals in *Board of Educ. of Hudson City School Dist.* (71 NY2d 21, supra), did not hold otherwise.

The movants also point out that Fischer does not cite to any case that holds that implied indemnification applies where, as here, the underlying claim by Snyder against

Fischer for solely pecuniary damages is based upon a breach of a separate travel agency agreement, not upon a breach of the Agreement, and Snyder does not seek to hold Fischer vicariously liable for any alleged wrongdoing by any of the movants.

Unlike the remedy of contribution, the remedy of indemnification is available for damages that arise out of an alleged breach of contract. (*17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80-82 [1st Dept 1999]). The indemnification claim is nonetheless dismissed because “[a] party sued solely for its own alleged wrongdoing, rather than on a theory of vicarious liability, cannot assert a claim for common law indemnification.” (*Gap, Inc. v Fisher Dev., Inc.*, 27 AD3d 209, 212 (1st Dept 2006), quoting *Mathis v Central Park Conservancy*, 251 AD2d 171, 172 [1st Dept 1998]). The complaint in the main action does not refer to vicarious liability on Fischer’s part. Rather, it seeks damages for Fischer’s alleged breach of an agreement between indemnification. Snyder and Fischer.

Furthermore, Fischer cannot maintain the indemnification claim because Snyder has brought a direct claim against it for breach of contract. Therefore, because Fischer’s liability “would be based upon such defendant’s own participation in the acts giving rise to the loss, that is, as an actual wrongdoer,” it cannot recover damages from movants under a theory of indemnification. (*Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 896 (1st Dept 2003), quoting *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453-54 [1st Dept 1985]).

Saks Group

Given the dismissal of all four of the causes of action brought in the third-party complaint, this court's jurisdiction or lack thereof over the Sacks Group need not be addressed herein.

Conclusion

Accordingly, it is

ORDERED that the motion to dismiss the third-party complaint is granted and the third-party complaint is dismissed with costs and disbursements to third-party defendants Impulsive Enterprises, the Sacks Group Yachting Professionals, Inc., and Hank Freid s/h/a Hand Fried as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: July 28, 2008

ENTER

HON. RICHARD B. LOWE, III

FILED
AUG 28 2008
COUNTY CLERK'S OFFICE
NEW YORK