

**Washington Mut. Bank, FA v Peak Health Club, Inc.**

2009 NY Slip Op 31334(U)

June 5, 2009

Supreme Court, Nassau County

Docket Number: 018977/2003

Judge: Ira B. Warshawsky

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SHORT FORM ORDERSUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU

## PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

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WASHINGTON MUTUAL BANK, FA, successor  
by merger to the DIME SAVINGS BANK OF NEW  
YORK, FSB,

Plaintiff,

-against-

PEAK HEALTH CLUB, INC., et al.,

Defendants.

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MERRILL LYNCH BUSINESS FINANCIAL  
SERVICES, INC.,

Plaintiff,

-against-

PEAK HEALTH CLUB, INC., et al.,

Defendants.

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WASHINGTON MUTUAL BANK, FA, successor  
by merger to the DIME SAVINGS BANK OF NEW  
YORK, FSB, et al.,

Third-Party Plaintiff,

-against-

PARAGON RESORTS, INC., et al.,

Third-Party Defendants.

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The following papers read on this motion:

TRIAL/IAS PART 9

INDEX NO.: 018977/2003  
MOTION DATE: 04/14/2009  
MOTION SEQUENCE: 008ACTION NO. 1

INDEX NO.: 004068/2004

ACTION NO. 2

INDEX NO.: 004068/2004

ACTION NO. 2

Notice of Motion, Affirmation & Exhibits Annexed ..... 1  
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 Affirmation on Behalf of Arnold Marshel in Opposition to Motion for  
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This motion by plaintiff Washington Mutual Bank, FA, successor by merger to the Dime Savings Bank of New York, FSB (“Washington Mutual”), for an order pursuant to CPLR 3212 granting it summary judgment awarding it attorneys’ fees is determined as provided herein.

This court has determined, and the Appellate Division, Second Department agreed, that both defendants East Coast and Marshel are personally liable to Washington Mutual for the amounts due under a Note, Mortgage, and Security Agreement, and that Marshel is personally liable pursuant to his Continuing Guaranty as well. More specifically, this court found that Marshel was liable in his individual capacity as “Principal of Mortgagor” and “Principal of Maker” of the Note despite an exculpatory clause: Under that clause, Marshel nevertheless remained liable for, *inter alia*:

(ii) any fraud, misrepresentation or breach of trust;

(xvi) any failure to comply with any other obligation to be complied with by Maker pursuant to the Loan Documents (except the obligation to pay the principal of this Note and interest thereon),

It further provided:

Maker and any principal of Maker shall in any event be and shall remain personally liable for each of the matters to which reference is made in the preceding sentence and the holder of this Note may seek, obtain and enforce one or more money judgments in any appropriate proceeding(s) with respect thereto.

This Court held:

While each of the . . . events of default can be satisfied by the well

established factual circumstances of this case, the most exceptional is Marshel's failure to notify WaMu that the Mortgage had not been recorded once he discovered that circumstance. He also discovered that the deed transferring the mortgaged premises to ECAC had not been recorded. . . In actual fact, by the May 17<sup>th</sup> agreement Marshel permitted the Pilottis, through East Coast, Pak and Paragon, to mortgage the premises, all to the detriment of the Dime/WAMU.

*Washington Mutual Bank, FA, successor by merger to The Dime Savings Bank of New York, FSB, v Peak Health Club, Inc.*, Index No. 018977/03 December 9, 2005 (Supreme Court Nassau County). In affirming this court's decision, the Appellate Division, Second Department held "[o]n its motion for summary judgment on the issue of liability on its causes of action seeking to hold Marshel liable for the outstanding indebtedness under its note, WaMu demonstrated its entitlement to judgment as a matter of law (*see, Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), by establishing that there had been an 'event of default,' and that Marshel could be held personally liable for the amounts due under the note (*see, Famolaro v Crest Offset, Inc.*, 24 AD3d 604, 604-605 [2005])." *Washington Mutual Bank, FA v Peak Health Club, Inc., et al.*, 48 AD3d 793 (2<sup>nd</sup> Dept. 2008), *lv dism.* 10 NY3d 911 (2008).

Washington Mutual, East Coast and Marshel have stipulated that as mortgagee, East Coast is liable for all of the costs and legal fees Washington Mutual incurred in this action. Although a judgment has been entered, this Court specifically reserved decision as to whether Marshel as the "Principal of Mortgagor" and/or the "Principal of Maker of the Note" is also liable for those fees and expenses. By way of this motion, Washington Mutual seeks judgment against Marshel for its legal fees, costs and expenses. If Washington Mutual is successful here, *vacatur* of that judgment is required and an Amended Judgment which reflects this Court's resolution of that issue must be entered. CPLR 5015(a)(2), 5019; Siegel, *New York Practice* § 420, p. 715; *see also, Herpe v Herpe*, 225 NY 323 (1919); *Horan v Town of Brookhaven*, 29 AD2d 563 (2<sup>nd</sup> Dept. 1967).

"[A]ttorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule." *Hooper Associates v AGS Computers, Inc.*, 74 NY2d 487, 491 (1989) citing *Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 (1986); *Mighty Midgets v Centennial Ins. Co.*,

47 NY2d 12, 21-22 (1979); *City of Buffalo v Clement Co.*, 28 NY2d 241, 262-263 (1971). In interpreting agreements to indemnify another party or to pay their counsel fees, the “[w]ords in [the] contract are to be construed to achieve the apparent purpose of the parties.” *Hooper Associates v AGS Computers, Inc.*, *supra*. “When 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.” *Hooper Associates v AGS Computers, Inc.*, *supra*, citing *Levine v Shell Oil Co.*, 28 NY2d 205, 211 (1971); *Kurek v Port Chester Hous. Auth.*, 18 NY2d 450, 456 (1966). Therefore, “[t]he 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 Associates v AGS Computers, Inc.*, *supra*, at citing *Niagara Frontier Transp. Auth. v Tri-Delta Constr. Corp.*, 107 AD2d 450, 452 (4<sup>th</sup> Dept. 1985), *aff’d. for reasons stated in opn of Justice M. Dolores Denman*, 65 NY2d 1038 (1985); *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 (1973); *Inman v Binghamton Hous. Auth.*, 3 NY2d 137, 147 (1957), *rearg den.* 3 NY2d 941 (1957); *see also, Fresh Del Monte Produce N.V. v Eastbrook Caribe A. V. V.*, 40 AD3d 415, 418 (1<sup>st</sup> Dept. 2007). Therefore, “[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 Associates v AGS Computers, Inc.*, *supra*, at p. 492, citing *Tokyo Tanker Co. v Etra Shipping Corp.*, 142 AD2d 377, 378 (1<sup>st</sup> Dept. 1989), *app. dismissed*, 74 NY2d 792 (1989), *app. denied*, 75 NY2d 702 (1989); *Carr v First Fed. Sav. & Loan Assn. of Rochester*, 132 AD2d 513, 514 (2<sup>nd</sup> Dept. 1987). Nevertheless, “indemnification clause [must] be read in conjunction with all the provisions in the agreement to avoid inconsistencies or an interpretation which would render another provision superfluous or without effect.” *DLJ Mortgage Capital, Inc. v Fairmont Funding, Ltd.*, 2008 WL 347767 (Supreme Court New York County 2008), citing *Hooper Associates v AGS Computers, Inc.*, *supra*, at p. 492-493; *see also, Two Guys from Harrison, N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 (1984).

The Note and the Mortgage both bear an exculpation provision which precludes the mortgagee from recovering of the mortgagor and its principal absent certain circumstances: That

limitation on liability is not applicable with respect to:

(i) liability under any guaranty(ies) or indemnity(ies) delivered or afforded to Mortgagee; (ii) any fraud, misrepresentation or breach of trust; . . .(xvi) any failure to comply with any other obligation to be complied with by Mortgagor pursuant to the Loan Documents (except the obligation to pay the principal of the Note and the interest thereon).

Marshel's Guaranty provides:

The Guarantor [Marshel] shall hold the Dime [Washington Mutual] and all directors, officers, shareholders, employees and agents of The Dime (collectively, the Indemnified Parties') harmless from, and indemnify the Indemnified Parties against, and shall reimburse the Indemnified Parties with respect to any and all Liabilities and Expenses . . . incurred by, imposed upon or asserted against the Indemnified Parties or any one or more of them by reason of, or in connections with, either (i) the occurrence of any event(s) or circumstance(s) specified in Section 1.8 of the Mortgage [Indemnity by Mortgagor] or (ii) The Dime's enforcement, or attempted enforcement, of this Guaranty.

The Guaranty defines "Liabilities and Expenses" as "cost and expenses in any manner arising out of or relative to the subject matter" and "costs and expenses" are defined as including reasonable fees charged by and expenses of attorneys. The Guaranty provides:

For the purposes of this Guaranty, "**Liabilities and Expenses**" shall mean costs and expenses in any manner arising out of or relating to the subject matter . . . and (ii) any and all monies payable to The Dime pursuant to any other provision of this Guaranty; as used herein, '**costs and expenses**' shall, without limitation, include all reasonable [sic] fees charged by and expenses of attorneys, accountants, engineers, contractors and professional consultants and advisors . . ."

Section 1.8 of the Mortgage provides:

Indemnity by Mortgagor. Mortgagor shall defend and indemnify Mortgagee and all directors, officers, shareholders, employees, attorneys and agents of Mortgagee (collectively, the "Indemnified Parties") against, and save the Indemnified Parties harmless from, and shall reimburse the Indemnified Parties with respect to, any and all claims, demands, action, causes of action, injuries, orders,

losses, liabilities (statutory or otherwise), obligations, damages (including, without limitation, consequential damages), fines, penalties, taxes, **costs and expenses (including, without limitation, reasonable attorney's fees and expenses)** incurred by, imposed upon or asserted against the Indemnified Parties . . . by reason of, or in connection with, (a) Mortgagee's interest in any Loan Document of the Mortgaged Property, (b) any misrepresentation or other incorrect statement or certification by Mortgagor . . . , (c) any failure by Mortgagor to comply with any of the terms, conditions or other provisions set forth in this Mortgage or any other Loan Document . . .

Marshel's Guarantee provides:

Absolute, Unconditional Guaranty. The agreements of Guarantors set forth in this Guaranty constitute, and shall at all times continue to constitute, an absolute, direct, present, primary, continuing, irrevocable, unlimited and unconditional guaranty of payment and performance . . . in all respects and shall at all times be valid and enforceable irrespective of any other agreements or circumstances of any nature whatsoever that might otherwise constitute a defense to this Guaranty . . .

**If Borrower at any time fails to perform or comply with any of Guaranteed Obligations** and such failure continues beyond the expiration of any applicable grace period, each **Guarantor shall immediately effect complete performance,** and, without release of Borrower, such **Guarantor shall be substituted for Borrower with respect to, and shall be primarily and directly liable to The Dime for, complete performance as set forth or stated herein or in the Loan Documents.**

Under the parties' written agreements, more specifically, the Guaranty, Marshel is personally obliged to hold Washington Mutual harmless and to indemnify it "for any and all liabilities" it incurs "in connection with . . . the occurrence of an event or circumstance specified in Section 1.8 of the Mortgage" as well as Washington Mutual's "enforcement . . . of the Guaranty." Section 1.8 of the mortgage requires the mortgagor to, *inter alia*, indemnify Washington Mutual and hold it harmless with respect to any costs and expenses (including without limitation reasonable attorney's fees and expenses) it incurs by reason of or in connection with any failure by the Mortgagor to comply with the terms and conditions of the

mortgage or loan document.

The costs and expenses incurred by Washington Mutual in foreclosing the mortgage were clearly, *inter alia*, “in connection with the mortgagor’s failure to comply with the terms and conditions of the mortgage,” i.e., its failure to file the mortgage and to notify Washington Mutual of that fact. In fact, the doctrine of *res judicata* precludes relitigation of that fact based upon both this court’s and the Appellate Division’s decisions. By his Guaranty, Marshel is obligated to indemnify Washington Mutual “for any and all liabilities incurred by it in connection” with an event or circumstance specified in Section 1.8 of the Mortgage, which this was. Washington Mutual is entitled to recover costs and attorney’s fees from Marshel. The Guaranty defines costs and expenses as including attorney’s fees. And, the Guaranty requires Marshel to complete East Coast’s performance which in turn includes the payment of attorney’s fees.

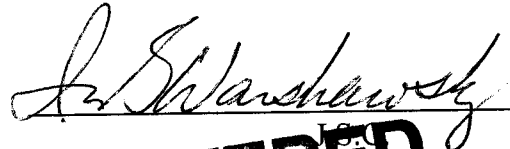
Contrary to Marshel’s position, reading the parties’ agreement in this fashion does not derogate any provisions of the parties’ agreement. To interpret the provision in the mortgage to require East Coast as Mortgagor and concomitantly Marshel as Guarantor to indemnify Washington Mutual only for third-party claims renders the provision requiring East Coast as Mortgagor, and concomitantly Marshel, as guarantor, to defend and indemnify Washington Mutual and reimburse it with respect to any and all claims, demands, actions, causes of action (including without limitation attorney’s fees and expenses) in connection with . . . “any failure by Mortgagor to comply with any of the terms, conditions or other provisions set forth in [the] Mortgage or any other loan document” meaningless. Washington Mutual would be the first and foremost predominantly affected party as the result of any such failure by East Coast.

In *Hooper Associates v AGS Computers, Inc.*, *supra*, the indemnification clause did not contain language clearly permitting the plaintiff to recover attorney’s fees in a suit between it and the defendant. The claims set forth in the indemnity provision were “typical of those which contemplate reimbursement when the indemnitee is required to pay damages on a third-party claim.” *Hooper Associates v AGS Computers, Inc.*, *supra*, at p. 492. Therefore, in *Hooper Associates v AGS Computers, Inc.*, *supra*, since the claims in the indemnification provision were not “exclusively or unequivocally referable to claims between the parties,” the court refused to extend the indemnification provision which had no logical application to a suit between the parties. *Hooper Associates v AGS Computers, Inc.*, *supra*, at p. 487, 549 NYS2d at 365.

Here, however, it is clear that the broad indemnification provisions of § 1.8 are intended to embrace litigation resulting from East Coast's failure to comply with the terms and conditions of the mortgage. Unlike in *Hooper Associates v AGS Computers, Inc. (supra)*, the court is not "required to imply" an obligation to pay attorney's fees; the requirement to pay fees is unequivocally set forth in the indemnity provision as well as in multiple other provisions of the Loan Documents.

Washington Mutual's motion is granted. The judgment entered March 29, 2006 is vacated and Washington Mutual is directed to submit an Amended Judgment which includes an award of costs and attorney's fees against Marshel.

Dated: June 5, 2009



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**ENTERED**

JUN 11 2009

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**