

Berkowitz v Club Ventures Invs. LLC

2009 NY Slip Op 32142(U)

September 18, 2009

Supreme Court, New York County

Docket Number: 602824/07

Judge: Richard B. Lowe

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

HON: RICHARD E. LONE, III

PRESENT: _____

PART 56

Index Number : 602824/2007

BERKOWITZ, MARK

vs

CLUB VENTURES INVESTMENTS LLC

Sequence Number : 006

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 3/9/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
SEP 21 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: SEP 18 2009

[Signature]

J.S.C.

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: IAS PART 56

-----X
MARK BERKOWITZ,

Plaintiff,

-against-

CLUB VENTURES INVESTMENTS LLC d/b/a DAVID
BARTON GYM, DAVID BARTON and JOHN HOWARD

Defendants.
-----X

Index No.
60024107

FILED
SEP 21 2009
COUNTY CLERK'S OFFICE
NEW YORK

Hon. Richard B. Lowe, III

Plaintiff Mark Berkowitz (Berkowitz) moves, pursuant to CPLR 3212 for an order granting him summary judgment on his seventh cause of action, and directing defendant Club Ventures Investments LLC d/b/a David Barton Gym (CVI) to pay him the attorneys' fees and costs he has incurred defending against CVI's counterclaims in this action to date, and to advance those fees and costs going forward.

Background

Berkowitz argues that he is entitled to indemnification and advancement of his attorneys' fees and costs pursuant to § 10.2.1 of CVI's June 11, 2004 Limited Liability Company Agreement (the CVI Agreement). Berkowitz, CVI's former Chief Financial Officer, states that, although CVI is advancing attorneys' fees and costs to defendants David Barton (Barton) and John Howard (Howard) pursuant to the CVI Agreement, it has refused to provide him with the benefit of that provision.

Section 10.2.1 of the CVI Agreement provides that CVI

shall indemnify, save harmless, and pay all judgments, penalties, fines, expenses and claims ... against a Covered Person ... relating to any liability or damage incurred by reason of any Permitted Acts of a

Member/Managing Member and in a manner reasonably believed to be within the scope of authority conferred on such Covered Person including, without limitation, attorneys' fees and reasonable disbursements incurred by such Covered Person in connection with the defense of any action based on any such act or omissions, *which attorneys' fees and reasonable disbursements shall be paid as incurred*

(emphasis added).

It is undisputed the Berkowitz is a Covered Person, as defined in Section 10.2.3 of the CVI Agreement. CVI's original answer in this action contained five counterclaims against Berkowitz. Berkowitz states that CVI's principal allegation in support of its original counterclaims was that he had engaged in misconduct during the term of his employment with CVI.

Berkowitz replied to CVI's original counterclaims, and also filed a first amended complaint that included the seventh cause of action at issue herein. CVI's answer to the amended complaint dropped four of the five counterclaims it had asserted in its original answer, and included a single counterclaim, accusing Berkowitz of misconduct during his tenure as CVI's CFO. Berkowitz denies all wrongdoing alleged in the amended counterclaim and asserts that all of his actions were Permitted Acts expressly authorized by Barton, CVI's managing member, such that the amended counterclaim is subject to Berkowitz's right to advancement of fees under the CVI Agreement.

Berkowitz claims that he incurred \$63,304.28 in attorneys' fees and expenses related to CVI's original counterclaims, and that he will continue to incur significant attorneys' fees and costs in defending himself against the remaining counterclaim.

Berkowitz argues that summary judgment is an "appropriate way to resolve advancement disputes because 'the relevant question turns on the application of the terms

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of the corporate instruments setting forth the purported right to advancement and the pleadings in the proceedings for which advancement is sought” (*Senior Tour Players 207 Mgt. Co. LLC v Golftown 207 Holding Co. LLC*, 853 A2d 124, 126-27 [Del Ch 2004], quoting *Weinstock v Lazard Debt Recovery GP, LLC*, 2003 WL 21843254, at *2 [Del Ch Aug 1, 2003]).

The CVI Agreement is governed by Delaware law, and Berkowitz asserts that Delaware courts have distinguished between the right to advancement and the right to indemnification, holding that “the right to advancement is not ordinarily dependent upon a determination that the party in question will ultimately be entitled to be indemnified” (*Senior Tour Players 207 Mgt. Co. LLC v Golftown 207 Holding Co. LLC*, 853 A2d at 128).

In opposition to the instant motion, CVI states that it sought to avoid motion practice over the indemnification issue by dropping all counterclaims except for a small claim relating to an American Express charge of approximately \$2,000. CVI contends that the counterclaims that were originally brought were more in the nature of defenses to liability, such that there was no practical reason to continue to maintain them if Berkowitz proposed to use them as a basis for claiming entitlement to fees. CVI asserts that the same would be true of the remaining counterclaim if the court were to find that Berkowitz is entitled to bill CVI for defense of the claim.

CVI argues that it is unclear whether Berkowitz is paying any fees, or even incurring liability to pay such fees. CVI states that it requested copies of bills, records of payment and engagement letters that would support Berkowitz’s claim that he is incurring legal fees, yet it has not received any documents in response. Berkowitz

informed CVI that he would not produce the documents unless defendants produce copies of their own legal bills. CVI points out, however, that Berkowitz is the party seeking reimbursement of fees that purportedly have been incurred, and that defendants have not requested that Berkowitz reimburse their fees.

CVI states that, at a February 23, 2009 conference, when Berkowitz mentioned to this court's Special Master that he wanted to obtain defendants' legal fee records, the Special Master stated that only the fee records of the party seeking fees is relevant. CVI contends that Berkowitz nonetheless continues to demand defendants' fee records as a precondition to production of his records.

CVI asserts that there is reason to think that Berkowitz, instead of incurring liability for fees on a current basis, has engaged counsel pursuant to a contingent fee arrangement.

CVI asserts that the instant motion should be denied for two reasons. The primary reason, according to CVI, is that there is no proof that Berkowitz has actually incurred any attorneys' fees in connection with the counterclaims. CVI argues that, for a party to have incurred legal fees, he or she must have paid, or be liable for payment of, those fees.

CVI contends that it appears likely that Berkowitz is pursuing this case with his attorneys on a contingent fee basis, and has not incurred liability for any legal fees as of now, such that he has no right to apply for indemnification of legal fees "as incurred."

According to CVI, the key issue is the meaning of "incur." CVI contends that Berkowitz's claim for indemnification is a sham unless he can show that he is actually liable to his attorneys for fees and expenses in the amount that he seeks to recover from

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CVI. CVI argues that if Berkowitz has not paid the fees that he is claiming, and he does not owe those fees, then he has no claim.

It is undisputed that the CVI Agreement's indemnification provision only covers Berkowitz for claims brought against him, not for claims that he has brought against CVI. Thus, CVI argues that the second reason the motion should be denied is because it is absurd for Berkowitz to suggest that his attorneys are owed approximately \$70,000 in fees for defending counterclaims that were never actively prosecuted. CVI points out that it has not taken any depositions, nor has there been any separate discovery with regard to the abandoned counterclaims. According to CVI, it is unlikely that Berkowitz could establish that his attorneys have spent more than a few hours on the counterclaims.

Thus, CVI argues that the instant motion should be denied. In the alternative, CVI contends that the issue should be referred to a Special Master for further fact-finding.

Discussion

Berkowitz, who is a Covered Person under the CVI Agreement, is entitled to advancement of the attorneys' fees and costs he has incurred and/or will incur in defending against the counterclaims brought as against him. The merits of the counterclaims need not be determined at this stage. "The scope of an advancement proceeding is usually summary in nature and limited to determining the issue of entitlement in accordance with the corporation's own uniquely crafted advancement provisions" (*Homestore, Inc. v Tafeen*, 888 A2d 204, 213 [Del 2005]; Del Code Ann, tit 8, § 145 [k]).

The issues at this time pertaining to the advancement are: (1) the amount, if any,

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of attorneys' fees and costs Berkowitz has incurred or will incur; and (2) the reasonableness of any such fees.

The purpose of advancement is to "provide[] corporate officials with immediate interim relief from the personal out-of-pocket financial burden of paying the significant on-going expenses inevitably involved with investigations and legal proceedings" (*Homestore, Inc v Tafeen*, 888 A2d at 211). If, as CVI suggests, Berkowitz's attorneys were hired on a contingency basis, and he does not owe them any attorneys' fees or legal expenses for their work on the counterclaims, then he is not incurring any expenses for which he should be advanced funds.

Finally, if Berkowitz shows that he has incurred or will incur expenses that he seeks to have advanced by CVI, the amount must be reasonable under the circumstances. The Delaware Supreme Court "has held that all contracts providing for the advancement of expenses are implicitly limited to those that are reasonably incurred" (*Id.* at 218).

Thus, the motion is granted to the extent of finding that Berkowitz is entitled to advancement of the attorneys' fees and costs he has incurred or will incur in defending against the counterclaims. The amount, if any, of such fees, however, remains to be determined. That issue is therefore sent to a referee.

Conclusion

Accordingly, it is

ORDERED that the summary judgment motion is granted in part, to the extent of finding that CVI must advance to Berkowitz the reasonable legal fees and costs he has incurred or will incur in defending against the counterclaims; and it is further

ORDERED that the issue of the amount, if any, of reasonable attorneys' fees and

expenses that Berkowitz has incurred or will incur in defending against the counterclaims is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,¹ upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date.

Dated: September 18, 2009

FILED
SEP 21 2009
COUNTY CLERK'S OFFICE
NEW YORK
ENTERED
HON. RICHARD B. LOWE, III
J.S.C.

¹Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.