

**Indemnity Ins. Co. of N. Am. v Merrill Lynch, Pierce,
Fenner & Smith Inc.**

2010 NY Slip Op 30627(U)

March 22, 2010

Supreme Court, New York County

Docket Number: 601371/09

Judge: Doris Ling-Cohan

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

PRESENT. Hon. Doris Ling-Cohan

PART 36

Justice

Index Number : 601371/2009

INDEMNITY INSURANCE CO. OF N. A.,

VS.

MERRILL LYNCH PIERCE FENNER & SMITH

SEQUENCE NUMBER : # 001

DISMISS

INDEX NO. 601371-09

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for dismiss

PAPERS NUMBERED

1, 2
3

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 to dismiss by defendant
is denied in accordance with the attached
memorandum decision.

FILED

MAR 25 2010

NEW YORK
COUNTY CLERK'S OFFICE

JUDGE DORIS LING-COHAN

Dated: 3/22/10

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

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INDEMNITY INSURANCE COMPANY of NORTH AMERICA

Plaintiff,

INDEX NO.
601371/09

-against-

MERRILL LYNCH, PIERCE, FENNER & SMITH
INCORPORATED,

Defendant.

Motion Seq.
001

FILED

MAR 25 2010

NEW YORK
COUNTY CLERK'S OFFICE

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LING-COHAN, J.S.C.:

In this action, plaintiff, Indemnity Insurance Company of North America (Indemnity Insurance), seeks to be indemnified by defendant, Merrill Lynch, Pierce, Fenner & Smith Incorporated (Merrill Lynch), the medallion signature guarantor (signature guarantor) of 452 shares of Texaco Inc. common stock with a dollar value of \$90,410.40 that was improperly transferred and surrendered allegedly in reliance on the signature guarantee. Merrill Lynch now moves, pursuant to CPLR 3211 (a) (5) and 3211 (a) (7) to dismiss this case on the ground that it is time-barred since the breach of the warranty occurred in 1994, more than six years before this action was commenced (see CPLR 213). Alternatively, Merrill Lynch argues that plaintiff has not demonstrated the merit to its claims that plaintiff discharged a duty that should have been borne by defendant. Indemnity Insurance vehemently opposes the motion.

Factual background

Plaintiff alleges and defendant does not deny that 452 shares of Texaco common stock purchased by Eunice Stacer ("Ms. Stacer") were improperly transferred and surrendered by defendant Merrill Lynch in early 1994 (Verified Complaint, May 4, 2009, ¶¶ 4-5). Plaintiff alleges that in early 1994, a person purporting to be Ms. Stacer asked a Merrill Lynch financial consultant to help her recover her "lost" Texaco shares, and said consultant thereafter wrote a letter to Texaco seeking replacement of the "lost" shares "of his client", notwithstanding the fact that Ms. Stacer had actually died two years earlier, on June 2, 1992 (*id.* at ¶¶ 5-6, 9).

On March 16, 1994, a replacement security certificate was presented to Merrill Lynch for a medallion signature guarantee. (*id.* at ¶ 7). Merrill Lynch guaranteed that the signature purporting to be that of "Ms. Stacer" was genuine and thereafter, the replacement security certificate, bearing the guaranteed signature was presented to Texaco for exchange.

Texaco, relying on Merrill Lynch's signature guarantee, exchanged the replacement security certificate (*id.* at ¶ 8).

At some time in 2005, Ms. Stacer's son, Ross Stacer, the fiduciary authorized to conduct business on behalf of the Estate of Eunice Stacer, presented the 452 original security certificates of common stock to Texaco, claiming a fraud and forgery had been committed in 1994 (*id.* at ¶ 10).

In October 2005 Texaco made payment to Mr. Stacer, as fiduciary of the estate of Ms. Stacer and Indemnity Insurance, as surety, made payment to Texaco to reimburse it for its losses (*id.* ¶¶ 11-12). These payments were made pursuant to a settlement agreement (Settlement Agreement) between Texaco and Indemnity Insurance which included an assignment of Texaco's rights to Indemnity Insurance to "any claim or claims relating to those 13 stock certificates, including but not limited to claims against brokers and relating to signature guarantee and a medallion guarantee" (Plaintiff's Ex 7).

Legal Analysis

In May 2009, four years after payment was made, Indemnity Insurance commenced this action for damages incurred as a result of defendant's signature guarantee. Plaintiff relies on section 8-306 (h) of the Uniform Commercial Code (UCC) which provides that the "warranties...are made to a person taking or dealing with the security in reliance on the guaranty, and the guarantor is liable to the person for loss resulting from the breach" of the warranties. Plaintiff maintains that Texaco, its assignee, is a "person" "dealing with the security in reliance on the guarantee," and that Merrill Lynch, as "guarantor," is "liable to such person for any loss," including indemnification damages (see *O'Neal v General Electric Co.*, 122 Misc 2d 430 [Sup Ct, Schenectady County 1983]).

Merrill Lynch argues that any direct claim Texaco may have made for breach of signature warranty lapsed on March 16, 2000, six years after the common stock was reissued in 1994 (see CPLR 213; *Allstate Ins. Co. v Stein*, 1 NY3d 416 [2004], [action accrued on the date of the accident, rather than the date of the insurer's payment of benefits to its insured]).

Thus, according to defendant, Texaco is no longer entitled to damages since the action is barred by the six year statute of limitations governing breach of warranty causes of action (CPLR 213). Defendant further asserts that since Texaco allegedly acted in 1994 "in reliance on the guarantee" within the meaning of UCC 8-306, the statute governing signature warranties, when the stock certificate was wrongfully transferred to the purported Ms. Stacer, the statute of limitations lapsed in March 2000, despite the fact that Texaco did not make payment on the loss until 2005 (CPLR 213; *O'Neal v General Electric Co.*, 122 Misc 2d 430, *supra*).

In its opposition to this motion to dismiss, plaintiff argues that defendant's characterization of this cause of action as one for breach of warranty is inaccurate. Plaintiff is asserting a cause of action for indemnification and the allegedly wrongful conduct, as the basis for indemnification, is Merrill Lynch's wrongful transfer of the stock certificates, in violation of the signature guarantee.

The focus of this indemnification claim is on whether Texaco

[*6]
discharged a duty in 2005, ie., made payment to Ms. Stacer's Estate for the underlying wrong, which should have been borne by Merrill Lynch. As such, according to plaintiff, its claims will not be time-barred until 2011 (CPLR 213).

It is well settled that a cause of action generally does not accrue until there is a loss (*McDermott v City of New York*, 50 NY2d 211, 217 [1980] ["since the cause of action is not complete until loss is suffered, familiar Statute of Limitations principles dictate that accrual occurs upon payment by the party seeking indemnity"]); *State of New York v Stewart's Ice Cream Co.*, 64 NY2d 83, 88 [1984], ["no compelling reason is presented in this case to diverge from the traditional view that an action for indemnity accrues when any 'loss is suffered' by the party seeking indemnity"]).

Here, Texaco did not suffer a loss in 1994 when it issued replacement security certificates because it had already received adequate consideration for those 452 shares of common stock when they were originally purchased by Ms. Stacer. In 1994, Texas was allegedly unaware that the signature guarantee was false and had no reason to believe so until 2005, when it was put on notice of the fraud and exchanged the 452 shares for a second time.

Notably, the case law relied upon by defendant in its memorandum of law supports plaintiff's position that "[t]he Statute of Limitations does not bar the claim for indemnification

* 7]

from loss, since indemnification arises on the date that the party seeking indemnification makes payment" (*O'Neal v General Electric Co.*, 122 Misc 2d at 433, citing *McCabe v Queensboro Farm Products, Inc.*, 22 NY2d 204 [1968]). Thus, "reliance," an essential element of a direct cause of action on a signature guarantee (see, *Conroy v Ford Motor Co.*, 147 AD2d 885 [3d Dept 1989]; *Wood v Wood*, 312 F Supp 762 [SD NY 1970]), did not occur for the purposes of this indemnification action in 1994, when plaintiff reissued the security certificates, but rather, it occurred in 2005, when Texaco suffered a loss by exchanging the same shares of stock again and making payment, for a second time (*O'Neal v General Electric Co.*, 122 Misc at 433).

The UCC statute both parties cite supports this result as well. Section 1-106 of the UCC states that Section 1-106 subdivision (1) provides in part that "[t]he remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had." This remedial statute "is expressly designed to encourage issuers and their agents," such as Texaco, "to rely upon signature guarantees and to avoid needless waste of time and duplication of effort in ascertaining the facts so guaranteed" (*id.*).

To the extent defendant argues that plaintiff has no right to

bring this action, plaintiff, as assignee, maintains a right to bring this action because Texaco assigned its rights to plaintiff in the Settlement Agreement, assigning "any claim or claims relating to those 13 stock certificates, including but not limited to claims against brokers and relating to signature guarantee".

Finally, defendant alternatively argues that the complaint fails to establish a claim for indemnification because it fails to sufficiently detail Texaco's obligation to reimburse Ms. Stacer's Estate in 2005.

After a careful review of the pleadings in a light most favorable to plaintiff, where all of the factual allegations are accepted as true (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1997]), and given the remedial purposes of the statute relied upon, as noted above, the pleadings sufficiently state a claim for indemnification, at this early juncture, as they sufficiently allege Merrill Lynch's responsibility for Texaco's damages, paid on account of Merrill Lynch's breach of duty.

In view of the foregoing, the court denies the motion to dismiss the complaint based upon the expiration of the statute of limitations or the failure to state a meritorious claim.

It is

ORDERED that the motion is denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 10 days after service of a copy of this order

[* 9]
with notice of entry; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendant, with notice of entry.

Dated:

3/22/10


Hon. Doris Ling-Cohan J.S.C.

J:\Dismiss\indemnity ins. merril lynch.wpd

FILED
MAR 25 2010
NEW YORK
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