

Three Hands Holdings, LLC v Lipman

2010 NY Slip Op 33269(U)

November 19, 2010

Supreme Court, New York County

Docket Number: 104011/10

Judge: Eileen A. Rakower

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

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 104011/2010
THREE HANDS HOLDINGS, LLC
vs.
LIPMAN, BRIAN
SEQUENCE NUMBER : 001
DISM ACTION/INCONVENIENT FORUM

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1, 2

3, 4

5

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

NOV 24 2010

NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 11/19/10

HON. EILEEN A. RAKOWER

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: PART 15

-----X

THREE HANDS HOLDINGS, LLC,

Index No.
104011/10

Plaintiff,

-against-

DECISION
and ORDER

BRIAN LIPMAN, RICARDO GOLDSCHMIDT,
ALAN PEYSER, DAVID SELTZER, MANUEL
GOLDSCHMIDT, BACHRACH INVESTORS, LLC,
and BACHRACH CAPITAL, LLC,
Defendants.

Mot. Seq.

FILED

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COUNTY CLERK'S OFFICE

-----X
HON. EILEEN A. RAKOWER:

Three Hands Holdings LLC ("Plaintiff") brings this action against Defendants for contractual indemnification pursuant to a Membership Interest Purchase Agreement dated May 29, 2008 ("Purchase Agreement"). Presently before the Court is a motion by Defendants to dismiss the Complaint pursuant to CPLR §3211(a)(1)&(7).

Plaintiff is a limited liability company that is engaged in the business of selling men's apparel. Defendants are partial owners of Bachrach Aquisition, LLC ("the Company"), a limited liability company that owned and operated approximately 50 men's clothing stores throughout the United States. According to the Complaint, Plaintiff and Defendants entered into discussions for the sale and purchase of the Company in early 2008. On May 29, 2008, Plaintiff entered into the Purchase Agreement with Defendants and the Company. Pursuant to this Agreement, Plaintiff purchased a 50% ownership interest in the Company for the sum of \$11,000,000.00. Of the total purchase price, \$9,000,000.00 was paid to the Company for the purchase of newly issued membership interests representing 40% of the total ownership interest in the Company; and \$2,000,000.00 was paid to Defendants for the purchase of portions of their membership interests, amounting to 10% of the total ownership interest in the Company.

Plaintiff alleges that the Company misrepresented its financial condition to Plaintiff and that, but for this misrepresentation, Plaintiff would not have entered into the Purchase Agreement. Specifically, Plaintiff alleges that the Company falsely represented that it was not in material breach of any of its commercial leases. According to the Complaint, however, the Company defaulted on its rental obligations on many of its commercial leases for the months of April 2008 and May 2008 (for a total deficiency of \$1,600,000.00).

On or around May 6, 2009, the Company filed for bankruptcy. Plaintiff claims that Defendants' and the Company's misrepresentations "proximately caused substantial loss to the Plaintiff in an amount approaching \$1,600,000.00;" and seeks indemnification from Defendants pursuant to Sections 3.15(b) & 10.3 of the Purchase Agreement. Section 3.15(b) of the Purchase Agreement is contained in Article III (titled "Representations and Warranties of the Company") and provides, in pertinent part,

Schedule 3.15(b) contains a true and correct list of all leases, subleases, concessions, licenses and other agreements (whether written or oral) of the Company (including all amendments, modifications, extensions, renewals, guaranties and other agreements with respect thereto) for each Leased Rental Property (each, a "Lease," and collectively, the "Leases"). Except as set forth on schedule 3.15(b) with respect to each of the Leases:... (iv) neither the Company nor, to the Knowledge of the Company, any other party to the Lease is in material breach or default under such Lease and no event has occurred or circumstance exists which, with delivery of notice, passage of time or both, would constitute such a material breach or default or permit the termination, modification or acceleration of rent under such Lease...

Section 10.3 of the Purchase Agreement provides, in pertinent part,

10.3 Indemnification by the Selling Members.

(a) From and after the Closing Date, each of the Selling

Members [Defendants] severally and not jointly, hereby indemnifies and holds the Buyer Indemnified Parties harmless from and against, and agrees to defend promptly the Buyer Indemnified Parties from and reimburse the Buyer Indemnified Parties for, any and all Loss that the Buyer Indemnified Parties may at any time suffer or incur, or become subject to, as a result of or in connection with any breach or inaccuracy of any of the representations and warranties made by such Selling Member in this Article IV of this Agreement or any other agreement or instrument delivered by such Selling Member, or by the Company on behalf of such Selling Member, pursuant hereto...

Defendants submit an affirmation and a memorandum of law in support of their motion to dismiss. Annexed to the affirmation as exhibits are copies of Plaintiff's Complaint and the Purchase Agreement. Defendants argue that they are entitled to dismissal because, under the express terms of the Purchase Agreement, any alleged misrepresentations with respect to the commercial leases were made solely by the Company and not the Defendants; and because the Purchase Agreement provides for indemnification by Defendants only in cases of misrepresentations by the Defendants, which is not the case herein.

Defendants note that the Purchase Agreement contains three separate articles covering representations by the Company (Article III); representations by Defendants (Article IV); and representations by Plaintiff (Article V). Defendants further note that, similarly, there are three separate indemnifications provisions in Article X of the Purchase Agreement (titled "Indemnification"): Section 10.2 ("Indemnification by the Company"); Section 10.3 ("Indemnification by the Selling Members," set forth above); and Section 10.4 ("Indemnification by the Buyer"). Section 10.2 provides, in relevant part,

10.2 Indemnification by the Company.

- (a) From and after the Closing Date, the Company hereby indemnifies and holds the Buyer and its

officers, managers, employees, members, agents, representatives, and Affiliates (collectively, the "Buyer Indemnified Parties") harmless from and against, and agrees to defend promptly the Buyer Indemnified Parties from and reimburse the Buyer Indemnified Parties for, any and all losses, damages, diminution in value, lost profits, costs, expenses, Taxes, liabilities, obligations, Actions and Claims of any kind, including, without limitation, reasonable attorneys' fees and other reasonable legal costs and expenses (hereinafter referred to collectively as "Losses"), that the Buyer Indemnified Parties may at any time suffer or incur, or become subject to, as a result of or in connection with: (i) any breach or inaccuracy of any of the representations and warranties made by the Company in this Agreement or any other agreement or instrument delivered by the Company pursuant hereto; and (ii) any failure of the Company to carry out, perform, satisfy and discharge any of the Company's covenants, agreements, undertakings, liabilities or obligations under this Agreement or under any of the agreements and instruments delivered by the Company pursuant to this Agreement...

CPLR §3211 provides, in relevant part:

- (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
 - (1) a defense is founded upon documentary evidence; [and]
 - (7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of

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action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]). On a motion to dismiss pursuant to CPLR §3211(a)(1) “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted) “When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Defendants are entitled to dismissal of the Complaint based upon the plain language of the Purchase Agreement. The Court finds no ambiguity whatsoever in the cited provisions of the Purchase Agreement, which clearly provide that it is the Company, and only the Company, that agrees to indemnify Plaintiff for any losses incurred as a result of “any breach or inaccuracy of any of the representations and warranties made by the Company in this Agreement...” Plaintiff does not dispute that it was the Company, and not Defendants (the Selling Members), that warranted and represented that the company was not in material breach or default of any of its commercial leases. Rather, Plaintiff interprets Section 10.3 of the Purchase Agreement to provide that any representations made by the Company are also made “on behalf of” Defendants as individual Selling Members.

However, a plain reading of the subject language makes clear that Defendants are obligated to indemnify Plaintiff for any losses occurring as a result of either: (1) a “breach or inaccuracy of any of the representations and warranties made by such Selling Member” in Article IV of the Purchase Agreement; or (2) “breach or inaccuracy of any of the representations and warranties made by such Selling Member” in “any other agreement or instrument”. Here, it is undisputed that the allegedly false representations were made by the Company in and pursuant to Article III of the Purchase Agreement. It was neither a representation made by a Defendant/Selling Member in Article IV of the Purchase Agreement; nor a representation by a Selling Member or Members in some other “agreement or instrument”. Moreover, the “on behalf of such Selling Member” language merely

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provides that such an “agreement or instrument” containing any “representations [or] warranties” made by a Selling Member would trigger Section 10.3's indemnity clause, whether delivered by the Selling Member(s), *or by the Company on his/their behalf.*

Wherefore it is hereby

ORDERED that the motion to dismiss is granted and the Complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: November ¹⁹~~20~~, 2010



EILEEN A. RAKOWER, J.S.C.

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