

Hengstler v Rivera

2010 NY Slip Op 33825(U)

November 23, 2010

Supreme Court, New York County

Docket Number: 104060/2010

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN
Justice

PART 57

Index Number : 104060/2010
HENGSTLER, DIANE
 vs.
RIVERA, MINERVA
 SEQUENCE NUMBER : 001
 DISMISS

INDEX NO. 104060/10
 MOTION DATE _____
 MOTION SEQ. NO. 001
 MOTION CAL. NO. _____

in this motion to ~~file~~ dismiss

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

PAPERS NUMBERED
1
2
3

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is

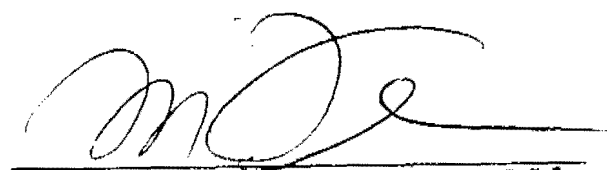
**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

FILED

NOV 30 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11-23-10



MARCY S. FRIEDMAN

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 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x

DIANE HENGSTLER,

Plaintiff,

- against -

MINERVA RIVERA, et al.,

Defendants.

_____ x

Index No.: 104060/10

DECISION/ORDER
FILED

NOV 30 2010

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This action arises out of the purchase by plaintiff Diane Hengstler of the stock of Vas Restaurant Corp. from defendant shareholders Minerva Rivcra, Angelique Irrizary and Roberta Terzo, pursuant to a Stock Purchase Agreement dated March 27, 2007. The complaint alleges breach of contract, negligence, and fraud. Defendants move to dismiss the complaint, pursuant to CPLR 3211(a)(1) and (7), based on documentary evidence and for failure to state a cause of action.

The standards for determination of a motion to dismiss are well settled:

The motion must be denied if from the pleadings' four corners "factual allegations are discerned which taken together manifest any cause of action cognizable at law." In furtherance of this task, we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion. We also accord plaintiffs the benefit of every possible favorable inference. Dismissal under CPLR 3211(a)(1) is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law."

(511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 [2002] [internal citations omitted].)

This case involves a question of contract interpretation and, in particular, the relationship between paragraph 4 of the Stock Purchase Agreement and an Addendum made on April 9, 2007, at the closing. Paragraph 4 is an indemnification provision, which provides, in pertinent part: “The Sellers agree to indemnify and hold Buyer harmless . . . from any liabilities, claims . . . , costs, and expenses, including reasonable attorneys fees, arising as a result of any acts or omissions occurring during Sellers’ ownership of the shares up to and including the date of closing.” The Addendum, paragraph 1, provides: “The parties agree that notwithstanding anything in the Contract to the contrary, Sellers have paid all outstanding debts of the corporation as of this date.” The Addendum, paragraph 2, provides: “Seller shall not be responsible for any further costs, expenses, fees or debts of the corporation after the date herein, & Purchaser takes subject to any amounts, outstanding, by the corporation, not otherwise paid as of the date hereof.”

It is well settled that “[a]ll parts of an agreement are to be reconciled, if possible, in order to avoid inconsistency.” (National Conversion Corp. v Cedar Bldg. Corp., 23 NY2d 621, 625 [1969].) Thus, “where two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect.” (HSBC Bank USA v National Equity Corp., 279 AD2d 251, 253 [1st Dept 2001][internal quotation marks and citations omitted].) Where two provisions are in conflict and cannot be reconciled, the court must, if possible, resolve the ambiguity, applying basic principles of contract interpretation. (See Honigsbaum’s, Inc. v Stuyvesant Plaza, Inc., 178 AD2d 702 [3d Dept 1991]; Greenwich Vil. Assocs. v Salle, 110 AD2d 111 [1st Dept 1985].)

Under basic principles of construction, “ ‘[w]hen a contract contains two repugnant

[* 4] •

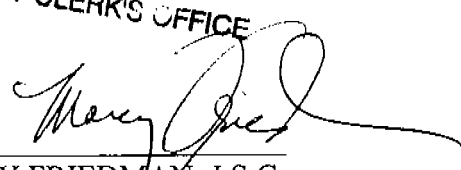
provisions, one printed and the other typewritten or handwritten, the written provision overrides the printed one and controls the interpretation and construction of the contract.’ ” (Ebbecke v Bay View Envtl. Servs., Inc., 145 AD2d 524, 525 [2d Dept 1988][internal citation omitted], appeal denied 74 NY2d 606 [1989]; 22 NY Jur2d, Contracts § 254. See Perth Amboy Drydock Co. v New Jersey Mfrs. Ins. Co., 26 AD2d 517 [1st Dept 1966].) Moreover, a general provision of a contract must be read in light of, and is limited by, a specific provision. (See 22 NY Jur2d, Contracts § 251.)

Applying these principles, the court finds that the Addendum bars any liabilities outstanding as of the date of the closing. However, the indemnification provision remains in effect to cover any claims or liabilities that were not made – i.e., were not outstanding – as of the date of the closing, but arose subsequent to the closing as a result of the acts or omissions that occurred during the Sellers’ ownership. Thus, for example, the Addendum bars plaintiff’s claim for the debt from the Department of Consumer Affairs that arose in 2004, but does not bar plaintiff’s claim for federal employment tax based on the IRS November 10, 2008 notice (P.’s Aff. In Opp., Ex. 6.)

The claims for fraud and negligence should be dismissed as duplicative of the breach of contract claim.

This constitutes the decision and order of the court.

Dated: New York, New York
November 23, 2010

FILED
NOV 30 2010
NEW YORK
COUNTY CLERK'S OFFICE

MARCY FRIEDMAN, J.S.C.