

<b>Vigilant Ins. Co. v Singer</b>
2011 NY Slip Op 33832(U)
July 13, 2011
Sup Ct, New York County
Docket Number: 650750-2010
Judge: J. Fried
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT **HON. BERNARD J. FRIED**

PART 60

Index Number : 650750/2010

**VIGILANT INSURANCE COMPANY**

VS.

**SINGER, BRAD**

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. 650750/10

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

Motion to/for \_\_\_\_\_

The

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

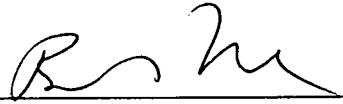
Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the attached memorandum decision.

SO ORDERED

Dated: 7/13/2011



\_\_\_\_\_  
J.S.C.

**HON. BERNARD J. FRIED**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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 60

-----X  
VIGILANT INSURANCE COMPANY and  
FEDERAL INSURANCE COMPANY,

Plaintiffs,

Index No. 650750-2010

-against-

BRAD SINGER and GARY SINGER,

Defendants.

-----X

**APPEARANCES:**

*For Plaintiffs:*

*For Defendants:*

FRENKEL LAMBERT, LLP  
One Whitehall Street, 20<sup>th</sup> Floor  
New York, New York 10004  
Eric M. Eusano, Esq.

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450 Lexington Avenue  
New York, New York 10017  
Joseph A. Patella, Esq.

**FRIED, J.:**

Plaintiffs, Federal Insurance Company (“Federal”) and Vigilant Insurance Company (“Vigilant”) commenced this action against defendants, Brad Singer and Gary Singer, (“Singers”) seeking indemnification for unpaid premiums and losses allegedly arising from surety bonds issued by Plaintiffs in connection with certain construction projects. (Complaint “Compl.” ¶ 5.)

Defendants move to dismiss Plaintiffs' Complaint in its entirety pursuant to CPLR 3211(a)(1), on the ground that a defense is based on documentary evidence. For the reasons set forth below, I deny Defendants' motion for dismissal.

The events giving rise to this lawsuit are as follows. Plaintiffs, as surety, and HRH Construction LLC ("HRH"), as principal, executed surety bonds to secure the performance of construction contracts and to secure liens filed by subcontractors for labor and materials furnished to certain property (the "Bonds") (Compl. ¶ 6.)

On October 24, 2001, HRH entered into a "General Agreement of Indemnity" (the "HRH 2001 Indemnity Agreement") in favor of Federal/Vigilant, which covered payments made by and/or liability asserted against Federal/Vigilant under the Bonds. (Compl. ¶ 3.) The HRH 2001 Indemnity Agreement further required HRH to "[P]lace... [Vigilant] in funds to meet all its liability under said bond or bonds *promptly on request and before* it may be required to make any payment thereunder..." (Compl. ¶ 25) (emphasis in original).

As consideration for Plaintiffs to execute the surety bonds, defendants Brad Singer, personally, and Gary Singer, personally, executed an agreement dated December 6, 2001 (the "December 2001 Agreement") to be bound as additional indemnitors to Federal/Vigilant pursuant to the HRH 2001 Indemnity Agreement in the event an "Excessive Funds Distribution" has been made. (Compl. ¶ 2.) Defendants expressly agreed, "[i]n [their] capacities as Members or officers of [HRH] and/or its Members and/or... as parties interested in the affairs of [HRH]":

- a. "[T]o prevent any 'Excessive Funds Distribution'; and

- b. “[T]o be, jointly and severally, bound as additional indemnitors [of Federal and Vigilant] pursuant to the... [Oct. 2001 Indemnity Agreement if any Excessive Funds Distribution is made without Federal/Vigilant written consent.]”

(Compl. ¶ 4.) In the December 2001 Agreement, Defendants agreed to an “Excessive Funds Distribution” – expressly making them, jointly and severally, bound as additional indemnitors of Federal/Vigilant:

“[A]ny distribution of funds from [HRH] to, or for the benefit of, [i] any of us, [ii] any member of [their] families, or [iii] any of [their] affiliates, which causes the total of such distributions... to exceed... the amount paid during [a fiscal] year for [HRH] income taxes... plus \$1,000,000”;

\* \* \*

“[Any d]istributions of funds *include, but are not limited to*, salaries, bonuses, capital distributions, loans, advances, and purchase of equity Units”.

(Compl. ¶ 4) (emphasis in original).

On November 14, 2005, HRH executed an additional “General Agreement of Indemnity” with Plaintiffs (the “2005 Indemnity Agreement.”) (Compl., Ex. D.) The 2005 Indemnity Agreement required HRH to indemnify Plaintiffs for losses arising from the issuance of “any and all Bonds heretofore or hereafter executed by Surety on behalf of any principal and/or any Indemnitor.” (Ex. D, ¶ 3.9.) The 2005 Indemnity Agreement further required HRH to deposit funds with Plaintiffs as collateral to enable Plaintiffs to pay losses arising from any bonds. (Ex. D, ¶¶ 4.1-4.2.) HRH therein specifically covenanted and agreed, among other things, as follows:

- 6.4 ENTIRE AGREEMENT – This Agreement... constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all other prior agreements and understandings, both written and verbal, among the parties or any of them with respect to the subject matter hereof.

6.9 OTHER INDEMNITY – The Principal and the Indemnitors shall continue to remain bound under the terms of this Agreement even though the Surety may have from time to time heretofore or hereafter, with or without notice to or knowledge of the Principal and the Indemnitors, accepted, reduced or released other agreements of indemnity or collateral in connection with the execution or procurement of said Bonds, from the Principal or Indemnitors or others, it being expressly understood and agreed by the Principal and the Indemnitors that any and all other rights which the Surety [Federal and Vigilant,] may have or acquire against the Principal and the Indemnitors and/or others under any such other or additional agreements of indemnity or collateral shall be in addition to, and not in lieu of, the rights afforded [Federal and Vigilant] under this Agreement. No Indemnitor shall raise any defense to the enforcement of this Agreement based on the addition or the release of any Indemnitor. The security interest, assignments, trust, indemnity and other rights granted herein, will not be deemed a waiver of Surety [Federal and Vigilant]’s equitable subrogation rights or other rights, said security and rights being in addition to the rights of exoneration, subrogation, and other rights to which Surety is entitled to under law or in equity, which Principal and Indemnitors expressly recognize.

(Ex. D., ¶¶ 6.4, 6.9.)

HRH’s related company, Remus HRH LLC (“Remus HRH”) filed an action entitled *Remus HRH LLC v. MTA* Index No. 650373/2009. In connection with a motion for a preliminary injunction, I reviewed substantial transfers of funds made from HRH to or for the benefit of the Singers, their affiliates, or family members that revealed an “Excessive Funds Distributions” was made. (Compl. ¶ 5.) My Decision and Order dated September 4, 2009, specifically found that:

“MTA has offered evidence tending to show that the payments that were characterized as loans were not actually loans at all, and that therefore it is unlikely that the Security Agreement [with Remus HRH] will be shown to have been a valid, at arms length transaction.”

“The evidence submitted by MTA has raised serious doubts as to the validity of the Security Agreement [with Remus HRH] and the loan transactions.”

(See Eusanio Aff. Ex. 6, 09/04/2009 Decision & Order at 5, 9).

In the Decision and Order, I further noted that Gary Singer was both an “owner of an interest in HRH” and the “outside investment advisor” to Remus HRH; and that the funds initially transferred to HRH as “member contributions” originated from “Remus Holdings LLC” (Remus HRH’s parent, and not Remus HRH itself) as well as from the Gary and Karen Singer Children’s Trust. (*Id.* at 6.)

On September 6, 2009, HRH filed for voluntary bankruptcy relief under Chapter 11. (Compl. ¶ 2.) In its sworn Statement of Financial Affairs filed with the Bankruptcy Court, HRH admitted that it had transferred the sum of over \$1.193 million to Remus Holdings by Check #360 dated June 8, 2009. (Eusania Aff., ¶ 6).<sup>1</sup>

According to the Complaint, in HRH’s Chapter 11 filings, and in the Remus HRH Action, substantial transfers of funds were made by or from HRH in the sums of \$1.193 million in June 2009 and \$3.1 million in Mar.-Apr. 2007, all “to, or for the benefit of” the Defendants, their family members and/or affiliates constituting “Excessive Funds Distributions”. (Compl. ¶ 5.)

The Complaint alleges that Defendants are liable to indemnify Plaintiffs under the December 2001 Agreement. (Compl. ¶ 5.) It is further alleged that Defendants have refused to indemnify, post collateral or exonerate Plaintiffs in violation of the Indemnity Agreements. *Id.* Plaintiffs seek contractual indemnification, collateral security, specific performance, exoneration, *quia timet*, an accounting and all legal or equitable relief against Defendants as additional indemnitors on the surety bonds issued by Plaintiffs. (Compl. ¶ 2.)

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<sup>1</sup> A copy of HRH’s Statement of Financial Affairs is annexed to the Eusania Affidavit in Opposition to Motion to Dismiss, Exhibit 5.

Defendants maintain that any and all obligations assumed by the Singers in the December 2001 Indemnity Agreement are based on the indemnity obligations set forth in the HRH 2001 Indemnity Agreement, which they argue has been superseded by the HRH 2005 Indemnity Agreement, terminating the Singers' indemnity liability under the December 2001 Agreement. Therefore, Defendants move to dismiss Plaintiffs' Complaint in its entirety on the basis of the documentary evidence.

On a motion to dismiss made pursuant to CPLR 3211, the complaint "is to be afforded a liberal construction," and the plaintiff is afforded the "benefit of every possible favorable inference." *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). "Whether a... plaintiff can establish its allegations is not part of the calculus in determining a motion to dismiss." *AG Capital Funding Partners, L.P. v. State Street Bank & Trust Company*, 5 N.Y.3d 582, 591 (2005). 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." *Richbell Information Services, Inc. v. Jupiter Partners, L.P.*, 309 A.D.2d 288 (1<sup>st</sup> Dep't 2003) (quoting *511 W.232<sup>nd</sup> Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002)). When the motion to dismiss is made pursuant to section 3211(a)(1), movants "must show that the documentary evidence conclusively refutes plaintiff's... allegations." *AG Capital Funding*, 5 N.Y.3d at 590-591.

At issue is whether the 2005 Indemnity Agreement, between Federal/Vigilant and HRH, extinguished the Singers' indemnity liability under the December 2001 Agreement, which was executed pursuant to the HRH 2001 Indemnity Agreement. Neither party claims that the contractual language is ambiguous.

Defendants argue that the merger clause in the 2005 Indemnity Agreement expressly supersedes the HRH 2001 Indemnity Agreement and point out that New York, of course, gives full effect to integration and merger clauses. *Pitt Street, LLC v. 85-87 Pitt Street Realty Corp.*, 83 A.D.3d 446, 446 (1<sup>st</sup> Dep't 2011). When the parties to a contract enter into a new agreement that expressly supersedes the previous agreement, the previous agreement is extinguished, thereby reducing the remedy for breach to a suit on the new agreement. *Citigifts, Inc. v. Pechnik*, 112 A.D.2d 832, 833 (1<sup>st</sup> Dep't 1985). However, a subsequent contract not pertaining to "precisely the same subject matter" will not supersede an earlier contract unless the subsequent contract has definitive language indicating it revokes, cancels or supersedes that specific prior contract. *Globe Food Servs. Corp. v. Consol. Edison Co. of New York, Inc.*, 584 N.Y.S.2d 820, 821 (1<sup>st</sup> Dep't 1992).

The 2005 Indemnity Agreement contains a merger clause which plainly states that the agreement supersedes "all other prior agreements and understandings, both written and verbal, among the parties or any of them with respect to the subject matter hereof." (Ex. D, ¶ 6.4.) Defendants argue that the merger clause contained in the 2005 Indemnity Agreement covers the HRH 2001 Indemnity Agreement because both agreements have the same contracting parties and concern the same subject matter. The HRH 2001 Indemnity Agreement required HRH to do two things: (i) indemnify Plaintiffs for claims made on the surety bonds; and (ii) advance funds to Plaintiffs to cover any liability arising from such claims. Defendants argue that HRH had the same obligations in the 2005 Indemnity Agreement with respect to old and new bonds and thus, the two agreements cannot co-exist and the earlier one is "extinguished."

As further evidence that the 2005 Indemnity Agreement supersedes the HRH 2001 Indemnity Agreement, Defendants point out that the 2005 Indemnity Agreement covers bonds previously issued by Plaintiffs. In a third party action against the Singers entitled, *MG Hotel LLC v. Bovis Lend Lease LMB, Inc. et al.*, Index No. 602262/2007, Plaintiffs conceded that the 2005 Indemnity Agreement applies to bonds that they previously issued. (Patella Affirmation, Ex. E.) Therefore, Defendants argue that HRH 2001 Indemnity Agreement ceased to be an operative document upon the execution of the HRH 2005 Indemnity Agreement.

Defendants also argue that the extent of the indemnity obligations in the 2005 Indemnity Agreement varies from the 2001 indemnity agreements and therefore the earlier agreements must be superseded. *See Balzano v. Lublin*, 162 A.D.2d 252, 253 (1<sup>st</sup> Dep't 1990) (“[P]arol evidence is not admissible to vary the terms of a written contract containing a merger clause.”) Moreover, Defendants assert that Plaintiffs’ counsel has stated that the “very purpose” of the December 2001 Agreement was to act as “security for the surety company” in the event HRH failed to satisfy its indemnity obligations to Plaintiffs.<sup>2</sup> Defendants claim that the 2005 Indemnity Agreement provides for a different source of security. In addition to the posting of collateral, the 2005 Indemnity Agreement requires HRH to assign to Plaintiffs certain rights including rights to bonded contracts, subcontracts, certain machinery, supplies and equipment “[t]o secure the obligations” of HRH. (See Ex. D, ¶ 5.1).

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<sup>2</sup> Plaintiffs filed a third-party action against the Singers in the matter entitled *MC Hotel LLC v. Bovis Lend Lease LMB, Inc. et al.*, Index No. 602262/2007, asserting the same claims in the present matter in connection with a bond issued in 2004. A copy of the third-party complaint is attached as Exhibit E to the Patella affirmation.

Consequently, Defendants argue that since the HRH 2001 Indemnity Agreement was superseded by the 2005 Indemnity Agreement, the December 2001 Agreement is no longer enforceable. In support of this argument, Defendants claim that the Singers' indemnity obligations in the December 2001 Indemnity Agreement were defined entirely by the HRH 2001 Indemnity Agreement. The Singers' obligation to advance funds to Plaintiffs as collateral cannot be found anywhere in the December 2001 Agreement. Rather, this obligation is provided in the HRH 2001 Indemnity Agreement. (Compl. ¶¶ 113, 117.) Since documents that are interrelated and co-dependent should be read and interpreted together, *Stonebridge Capital, LLC v. Nomura Intern. PLC*, 897 N.Y.S.2d 672 (1<sup>st</sup> Dep't 2009), Defendants' position is that their obligations to indemnify and advance funds to Plaintiffs are based entirely on an agreement that has been superseded and is no longer operative.

Plaintiffs respond that, on the face of the indemnity agreements, there was no intent to release or terminate the Singers or others from their contractual indemnity, collateral or exoneration obligations owed to Federal/Vigilant. The 2005 Indemnity Agreement not only does not specifically identify or provide for the termination of the prior December 2001 Indemnity Agreement, it does not involve the same parties or provisions.<sup>3</sup>

Plaintiffs argue that the 2005 Indemnity Agreement does not supersede the 2001 HRH Indemnity Agreement with regard to the Singers because they are not a party and the merger clause is expressly limited to "prior agreements" between "the parties". (Ex. D, ¶ 6.4.) A merger clause in a subsequent contract cannot supersede contractual indemnification

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<sup>3</sup> The December 2001 Indemnity Agreement was executed between the Singers and Federal/Vigilant, whereas the 2005 Indemnity Agreement was executed between HRH and Federal/Vigilant.

claims under a prior, separate indemnity agreement involving a “non-party” to the subsequent contract. *The Limited, Inc. v. McCrory Corp.*, 169 A.D.2d 605, 606-607, (1<sup>st</sup> Dep’t 1991). Indeed, the First Department has made it clear that the preclusive effect of a “merger” clause is limited to the claims against “the parties” to the agreement containing the merger clause, i.e. the 2005 Indemnity Agreement. *L.K. Station Group, LLC v. Quantek Media, LLC*, 62 A.D.3d 487, 491, (1<sup>st</sup> Dep’t 2009). Thus, since the merger clause of the 2005 Indemnity Agreement provides “This Agreement... constitutes the entire agreement among the parties.” (Ex. 5, ¶ 6.4), a plain reading of this clause warrants the conclusion that its preclusive effect is limited to the claims against HRH.

Plaintiffs further argue that the 2005 Indemnity Agreement does not have the same purpose as the December 2001 Agreement and that the two agreements may coexist. Where there are admittedly “separate” contracts that deal with “different” subject matters, have different purposes, or are “supported by independent consideration”, a merger clause in a subsequent agreement cannot supersede that prior, separate agreement. *Wattenburg v. Wattenburg*, 277 A.D.2d 69, 69, (1<sup>st</sup> Dep’t 2000). The purpose of the December 2001 Agreement was to ensure Federal/Vigilant that once an “Excessive Funds Distribution” was made from HRH “to or for the benefit” of the Singers, their family or affiliates, the Singers would be personally “bound” and liable to Federal/Vigilant as additional indemnitors, and not just HRH. (Compl. ¶ 4.) On the other hand, the purpose of the 2005 Indemnity Agreement was to ensure that HRH indemnified and advanced funds to Plaintiff to cover any liability arising from the Bonds. (Ex. D, ¶ 3.2.) Therefore, the two agreements may coexist

and the Singers' indemnity obligations under the December 2001 Agreement are not extinguished.

Turning now to Section 6.9 of the 2005 Indemnity Agreement, Defendants argue that its purpose is to ensure the enforceability of the HRH 2005 Indemnity Agreement regardless of what the Surety (Federal/Vigilant) has done or may do. Defendants point to the opening language, which states "The Principal and Indemnitors shall continue to remain bound under this agreement even though the Surety may have from time to time heretofore or heretoeafter... accepted, reduced or released other agreements of indemnity or collateral in connection with the execution or procurement of said Bonds." (Ex. D, ¶ 6.9.) Thus, Defendants claim that the provision is not concerned with preserving any agreements other than the one in which it is contained.

Defendants further argue that Plaintiffs' interpretation of Section 6.9, that it preserves their rights under the HRH 2001 Indemnity Agreement and the December 2001 Agreement, would render the merger clause in Section 6.4 meaningless. According to Defendants, Section 6.9, by its plain language, preserves only the rights of the parties to the 2005 Indemnity Agreement and not any other agreement.

Plaintiffs respond that Section 6.9, "Other Indemnity", explicitly provides that Federal/Vigilant reserved all rights against the Singers under the December 2001 Agreement and that there was no intent to release or terminate the Singers from their contractual indemnity, collateral, or exoneration obligations owed to Federal/Vigilant. (Eusanio Aff., Ex. 4 ¶ 6.9). Plaintiffs point out that the 2005 Indemnity Agreement provides that all parties had agreed to preserve and not waive any rights by Federal/Vigilant against the Singers or others

- irrespective of the fact that the 2005 Indemnity Agreement had granted Federal/Vigilant additional "indemnity and other rights." *Id.*

Upon review of the 2001 HRH Indemnity Agreement, the December 2001 Agreement and the 2005 Indemnity Agreement, it is clear that Defendants have not established a defense to the asserted claims as a matter of law. The documentary evidence submitted by movants does not unequivocally refute Plaintiffs' allegations that Defendants are contractually liable for indemnification.

Accordingly, it is

ORDERED that Defendants' Motion to Dismiss is DENIED.

DATED: 7/13/2011

ENTER:



J.S.C.

**HON. BERNARD J. FRIED**