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

PRESENT: HELVIN L. SCHWEITZER PART 45

Index Number : 650181/2010
MADISON SQUARE GARDEN,L.P.
vs
XO HOLDIGS, INC.,
Sequence Number : 004
SUMMARY JUDGMENT

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

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

	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 by plaintiff for summary judgment is DENIED; and it is further ORDERED that the third party defendant's motion to dismiss is GRANTED as to the first cause of action for contribution and that claim is severed and dismissed; and it is further ORDERED that the third party defendant's motion for indemnification (second cause of action) is DENIED, all as per the attached Decision and Order. The Clerk is directed to enter judgment accordingly.

Dated: January 31, 2012

Helvin L. Schweitzer
J.S.C.
MELVIN L. SCHWEITZER

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 45

MADISON SQUARE GARDEN, L.P., Plaintiff,	Index No. 650181/2010
-against-	DECISION AND ORDER
XO HOLDINGS, INC. and XO COMMUNICATIONS, LLC, Defendants/Third-Party Plaintiffs,	Motion Sequence: 004, 005
-against-	
SCOTT CAMAROTTI, Third-Party Defendant.	

MELVIN L. SCHWEITZER, J.:

Motion sequence numbers 004 and 005 are consolidated for disposition.

This is an action to recover monies allegedly owed for the corporate use of a private suite at Madison Square Garden (The Garden). Plaintiff Madison Square Garden, L.P. (MSG) moves for summary judgment (CPLR 3212) in the amount of $359,852.96, representing the balance of the suite's license fee plus charges for unpaid food, beverage and tickets. Defendant XO Holdings, Inc. (XO) opposes the motion on the ground that the employee who signed the license agreement on behalf XO, third-party defendant Scott Camarotti (Camarotti), lacked authority to do so. Camarotti moves to dismiss XO's third-party complaint for contribution and indemnification (CPLR 3211, 3212).

Facts

The following facts are taken from the affidavits of the parties, the pleadings and the documentary evidence, and are undisputed unless otherwise indicated. Plaintiff MSG owns and operates The Garden in New York City, which hosts first-class sporting and entertainment events. Defendant XO is a telecommunications provider, and defendant XO Communications, LLC, (Communications) is a wholly-owned subsidiary of XO. Carl Icahn (Icahn) is the Chairman and majority shareholder of XO.

Third-party defendant Camarotti is a former employee of Communications who was hired as Vice President of its National and Strategic Accounts division (NAS) in July 2009. In late September 2009, Camarotti executed, purportedly on behalf of XO, a "Madison Square Garden Club Suite Agreement" (the Agreement) with MSG. Michael Ondrejko, Senior Vice President of Corporate Hospitality Sales and Service, signed on behalf of MSG.

The Agreement provided XO with the exclusive use of a club suite (the Suite) for public events at The Garden for a one-year term commencing on November 1, 2009. It also provided XO with a $10,000 credit toward the purchase of food and beverage at the Suite. In exchange, XO was required to pay MSG a license fee of $450,000 and a security deposit of $50,000. Half of the security deposit was due upon execution of the Agreement. The second half of the deposit, plus the license fee (for a total of $475,000) was payable in four equal installments of $118,750, which came due on the first of each month from January through April 2010. The Agreement also required XO to pay for any food and beverage purchased at the Suite, to the extent it was not covered by the $10,000 credit.

By mid-October 2009, Communications was furnishing the Suite and putting up company signs. Camarotti and Angela Oaks (Oaks), the Field Marketing Manager at

Communications, also began publicizing the availability of the Suite within the company. On October 12, 2009, they sent an e-mail to the entire NAS sales force, stating, in part, that "[t]he XO Madison Square Garden Suite is the perfect place to strengthen existing customer relationships, build new relationships, access sold-out events and reward customer loyalty!" By the end of October, invitations to attend numerous sporting events and concerts at the Garden had been extended to key clients and other "strategic Icahn relationships" in the corporate world. These invitees included senior officers, account "decisionmakers" and other representatives of Citigroup, Deutsche Bank, Bank of New York, JPMorgan and Credit Suisse.

Although, as noted, the Agreement required part payment of the security deposit upon execution, MSG did not receive it until early November 2009. At that time, Camarotti had several of his subordinates split the $25,000 due among their credit cards. Later that month, Camarotti's superiors at Communications, including Vice President/Chief Marketing Office Michael Toplisek (Toplisek), decided that the Agreement could not be honored absent a substantial re-negotiation of its price. Camarotti's employment was terminated shortly thereafter, in part, allegedly, for his role in procuring the Agreement. On November 17, 2009, Oaks e-mailed her contact at MSG inquiring about the options for delaying or canceling the Agreement.

The following week, Toplisek conducted a review and determined that many important clients had already received tickets to events taking place at The Garden between November 2009 and January 2010. To avoid embarrassment and damage to future business relationships, he decided that he would not rescind the invitations that had been extended for that period. Through the end of January 2010, over 250 individuals from more than 25 companies attended

events at the Suite. The $10,000 food and beverage credit under the Agreement was exhausted, and additional charges of $5,626.76, including additional Knicks game tickets, were incurred.

The parties discussed various settlement options while the Suite was in use. Ondrejko initially promised to send Toplisek a proposal by the end of December but did not do so. When he then told Toplisek that the proposal would be forthcoming, Toplisek replied that his company would temporarily continue to use the Suite in January 2010 while awaiting MSG's new offer. XO did not make the payment due under the Agreement on January 1, 2010.

Ondrejko sent a proposal to Toplisek at some point in January, but it was rejected by MSG's senior management. No use was made of the Suite after January 31, 2010. On February 1, 2010, XO's in-house litigation counsel, Chuck Wilcox, advised Ondrejko that XO "denie[d] all liability in this matter."

The parties dispute Camarotti's authority to bind XO to the Agreement, and differ as when XO first learned of that issue and raised that it with MSG. XO has submitted a corporate "Table of Approval Authorities" indicating that an employee with Camarotti's title would not have the power to approve a contract the size of the Agreement. Additionally, Toplisek contends that he specifically told Camarotti that XO could not enter into such an agreement due to budgetary constraints. Both Toplisek and Catharina Vandervoort, Assistant General Counsel of Communications, have submitted affidavits indicating that they first learned about the allegedly unauthorized agreement mid-November, and advised Ondrejko of the problem later that month.

On the other hand, Camarotti has testified that he entered into the Agreement with the full knowledge and approval of Toplisek. Ondrejko has denied that Vandervoort ever raised the authority issue with him in their conversation, and asserts that Toplisek did not raise it until a conversation on December 16, 2009.

Procedural History

MSG commenced this action in March 2010. The complaint asserts a claim for breach of contract against XO, and causes of action for quantum meruit and unjust enrichment against both XO and Communications. In June 2010, XO and Communications filed a third-party complaint against Camarotti seeking indemnification and common law contribution for any judgment obtained by MSG.

In January 2011, XO sent MSG a check for $96,500. That amount represented payment for the license fee, pro rated for the three months' use of the Suite, plus the $10,000 food and beverage credit, less the $25,000 deposit. MSG accepted that amount without prejudice to any of its rights in this litigation. In May 2011, after MSG filed its motion, XO sent another check for $1,577.63. XO contended that this amount, rather than the $5,626.76 asserted in MSG's papers, was the actual balance owed for food and beverage.

Discussion

For the following reasons, MSG's motion for summary judgment is denied. Camarotti's motion to dismiss is granted as to the third-party claim for contribution, but denied as to the claim for indemnification.

Plaintiff's Motion for Summary Judgment

In moving for summary judgment, MSG puts aside the question of Camarotti's authority to bind XO and relies solely on the theory that XO ratified the Agreement by using the Suite for three months after learning of his alleged misconduct. However, as discussed below, accepting the benefits of a contract does not automatically signify ratification. The record may show that XO was justified in repudiating the Agreement while honoring the existing commitments made to its important corporate clients who had been invited to events at the Suite without its

knowledge -- particularly if MSG knew or should have known that Camarotti was acting outside of his authority.

"[A] principal's acceptance of benefits from a contract that was unauthorized when originally executed constitutes an affirmance of the contract that, *under appropriate circumstances*, will give rise to a ratification," *Matter of Cologne Life Reins. Co. v Zurich Reins. (N. Am.)*, 286 AD2d 118 (1st Dept 2001)(emphasis supplied). The rule is thus not absolute, as MSG suggests -- the circumstances must be "appropriate." Where no express assent to the transaction has been given, ratification will only be presumed where there has been "conduct that justifies a reasonable assumption that the person so consents," *Restatement (Third) of Agency* § 4.01(2)(b).

The mere retention of the benefits of an unauthorized act does not constitute a ratification where the principal has already "chang[ed] position to his or her prejudice," *NY Jur 2d (Agency)* § 203. For example, a corporate plaintiff may have partially performed under a contract and be unable to return the benefits at the time that it first learns of the agent's unauthorized transaction and its complete terms. Under such circumstances, the company may retain the benefits while repudiating certain inequitable aspects of the agreement, *see Stanley v Franco-American Ferment Co.*, 97 Misc 401 (App Term, NY, 1st Dept 1916) (corporation which had received authorized loan and made payments thereon could retain proceeds and reject interest rate to the extent it was excessive). Where the unauthorized agent has already paid out the proceeds of a transaction, the company may still repudiate the agreement if it was unaware of such payment at the time it was made, even if it was used for corporate purposes, *Giebler Mfg. Co. v Kranenberg*, 102 AD 471 (App Term, NY, 2d Dept 1916)(no ratification where company president applied proceeds of unauthorized machinery sale to company debt without directors' knowledge).

Although case law on this precise issue is scarce in New York, other jurisdictions have concurred that "retaining the benefits will not necessarily constitute ratification if the principal cannot then repudiate the entire contract without incurring a loss," *Sphere Drake Ins. Ltd. v All American Life Ins. Co.*, 300 F Supp 2d 606, 627 (ND Ill 2003); *Corn Belt Bank v Lincoln Sav and Loan Assoc.*, 119 Ill App 3d 238, 250 (Ill App 4 Dist 1983)(retention of benefits will not constitute ratification where "conditions are such that [the principal] cannot be placed in status quo or repudiate the entire transaction without loss")(citations omitted). A company's failure to return the benefits received under an unauthorized agreement will not effect a ratification if the return cannot be effected without impairing existing commitments to customers, *see German-American State Bank v Mut. Benefit Health & Acc. Assoc.*, 107 Neb 124 (1921)(insurance company not required to refund monies collected by agents acting outside their authority where the funds were already applied to customer policy premiums); *see also W.W. Marshall & Co. v Kirschbraun & Sons*, 100 Neb 876 (1917)(manufacturer did not ratify excessive price for butter fat agreed to by its unauthorized agent even though it retained the fat and converted it into butter after receipt, as the fat was perishable and converting it avoided a loss); *Wing v Lederer,* 77 Ill App.2d 413 (Ill App1966) (homeowner did not ratify workman's unauthorized pruning and spraying of tree where he had no choice but to accept the benefits of the completed work); *Corpus Juris Secundum* § 70 ("The principle that ratification follows retention of benefits received is not applicable if the principal receives a benefit, the return of which is not possible . . . [t]he rule is likewise inapplicable if the continued enjoyment of the benefits by the principal is unavoidable").

Comment c to the Restatement (Third) of Agency, § 99, provides some helpful guidance on the application of this rule:

> [I]f the situation of the principal has so changed that it is inequitable to require their return under the changed circumstances their retention does not constitute an affirmance. In determining whether it is inequitable to require their return, the fact that the other party knew that the agent was unauthorized or in the exercise of care should have know about it, the amount of time which has elapsed between the original transaction and the time when the principal discovered the facts, the amount of loss which the principal would suffer if he were required to return the things, and other similar factors are considered.

Here, XO has made at least a colorable case that Camarotti's allegedly unauthorized conduct placed it in a position where it could not reject the benefits of the Suite without substantially impairing its customer relationships. Crediting XO's version of events for the purposes of this motion only, the authorized officers of the company did not become aware of the Agreement made on its behalf until Camarotti and his underlings had booked the Suite through the end of January 2010 with large corporate clients. XO faced a potentially significant loss of goodwill, and may well have been justified under the circumstances in using the Suite to fulfill the existing commitments while repudiating the remainder of the term of the Agreement.

XO's alleged repudiation was prompt, coming soon after the company became aware of the Agreement and had done an investigation into the number of outstanding client invitations. Regarding MSG's knowledge of Camarotti's agency, there are sufficient facts in the record to support an inference that MSG knew or should have known that he was unauthorized to contract for XO. Camarotti was an employee of Communications, not XO; the security deposit was not tendered upon execution as required by the Agreement; and when the deposit was made, the payment was divided among several employee credit cards instead of by a single check from XO. From this, a trier of fact might even conclude that MSG was attempting to assist Camarotti in bypassing the usual channels of approval, with the intent of binding XO to an unfavorable

contract that it had enticed an inexperienced, lower-level employee to sign. Although, for its part, MSG has proffered significant counter-evidence of Camarotti's actual and apparent authority, it simply raises credibility issues and other questions of fact. Moreover, as noted, MSG has conceded the issue of Camarotti's authority for the purposes of this motion in order to pursue its ratification argument.

Additionally, a fact-finder could reasonably conclude that under all the circumstances XO's use of the Suite was not intended to give assent to the Agreement, and was not perceived as such by MSG. Apart from XO's alleged express repudiation, the parties entered into negotiations to resolve the dispute and MSG ultimately proposed a new arrangement. Moreover, MSG did not demand the payment due on January 1st, 2010, nor take measures to prevent XO from using the Suite.

MSG's argument that XO has greatly profited from the use of the Suite is misplaced. Whether XO ultimately generated business after entertaining clients there has no bearing on the questions of repudiation and ratification. In any event, the actual net financial gain to XO by virtue of its use of the Suite would raise questions of fact which cannot be determined on the present record.

MSG is also not entitled to partial summary judgment on its claim for the $5,626.76 in unpaid food and beverages. Although the court agrees that XO has not challenged MSG's invoices with competent evidence and has forfeited the right to do so, MSG received a refund of the $10,000 credit. MSG did not apply that to the food and beverage bill, but instead deducted it from the total amount it claims it would be due if, contrary to this ruling, summary judgment were granted in its favor.

Without interposing a crossmotion, XO requests summary judgment in its favor on the ground that MSG has failed to prove it mitigated its damages. XO also asserts that MSG's quantum meruit and unjust enrichment claims must be dismissed because MSG elected its remedies by moving for summary judgment on the contract claim. Both of these applications are denied. First, the failure to mitigate of damages is an affirmative defense on which XO has the burden of proof, and must establish "not only that plaintiff failed to make diligent efforts to mitigate . . . but also the extent to which such efforts would have diminished plaintiff's damages," *LaSalle Bank Nat Assoc. v Nomura Asset Capital Corp.*, 72 AD3d 409, 411 (1st Dept 2010). XO has not seriously attempted to make such a showing, instead impermissibly shifting the burden to MSG to prove mitigation. Furthermore, MSG has presented evidence of its efforts to license each of its suites, and evidence that due to its inventory of unlicensed suites it was a "lost volume seller" excused from the duty to mitigate, *see Neri v Retail Marine Corp.*, 30 NY2d 393 (1972); *In re 375 Park Ave. Assocs., Inc.*, 182 BR 690 (Bkrtcy SD NY 1995). Second, as to XO's election of remedies argument, it has no application where, as here, the non-moving party disputes the existence of a contract, *see Parkash v Utilisave Corp.*, 295 AD2d 330 (2d Dept 2002).

Third-Party Defendant's Motion to Dismiss

Camarotti's motion to dismiss XO's third-party claim for contribution is granted. "Claims for contribution are governed by CPLR 1401 and apply to damages for personal injury, injury to property or wrongful death," *Structure Tone, Inc. v Universal Services Group, Ltd.*, 87 AD3d 909, 11 (1st Dept 2011). Because MSG seeks to recover purely economic losses flowing from a breach of contract, the statute does not apply, *Id.*

The motion to dismiss the claim for common law indemnification is denied. "A party's right to indemnification . . . may be implied based upon the law's notion of what is fair and proper as between the parties," *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374-375 (2011)(internal quotations and citations omitted). "Implied [or common-law] indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other," *Id.* (internal quotations and citations omitted). However, "a party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part," *Id.* at 377-378. "[S]ince the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine," *Broyhill Furniture Indus., Inc. v Hudson Furniture Galleries, LLC*, 61 AD3d 554, 556 (1st Dept 2009)(internal quotation and citations omitted); *see Edge Mgt Consulting, Inc. v Blank*, 25 AD3d 364, 367 (1st Dept 2006).

Although Camarotti cannot be held liable to XO if he had actual authority to contract on its behalf, he may if he deliberately disregarded his superiors' orders and executed the Agreement in contravention of company policy. The fact that XO may have cloaked him with apparent authority does not, standing alone, constitute participation in the wrongdoing:

> [I]f a principal commits acts that create an apparent agency relationship and the principal thereby becomes responsible to an outside party for the agent's acts, this does not necessarily mean that the principal is barred from obtaining indemnity. Even if the agent was imbued with apparent authority in a third person's eyes, the agent would necessarily know that it could not properly purport to bind the principal without actual authority. If the agent acted without actual authority, there is no reason that it should not be held responsible for the principal's liability. As between a principal

> who -- perhaps unintentionally -- creates apparent authority and an agent who acts knowing he has no actual authority, it is only fair that the principle of indemnity would permit the principal to recover from the improperly acting agent.

(Internal citations omitted); *see Gleason v Temple Hill Assocs.*, 159 AD2d 682 (2d Dept 1990).

XO has presented evidence that Camarotti was aware that he lacked authority to enter into the Agreement. He was an employee of Communications, not XO. As noted, XO contends that Toplisek forbade him from going forward with the Agreement, and he paid the security deposit in an unusual manner that suggests he was attempting to evade detection. XO also points out that the e-mail announcing the availability of the Suite was not sent to Toplisek or Camarotti's other immediate superiors. Although the e-mail was apparently sent to an individual who was a liason to Carl Icahn and XO's board of directors, and to another who served as a "program manager to the Icahn team," it cannot be determined on the record whether their inclusion on the mailing list constituted meaningful notice to XO.

Camarotti argues that XO's culpable conduct went beyond merely holding him out an agent. He contends that his employer participated in the alleged wrongful conduct by using the Suite for three months after it fired him. However, as noted above, XO may show that the continued use was justified under the circumstances due to the existing commitments to its clients -- commitments which XO contends were concealed by Camarotti until it was too late.

In short, XO has alleged facts which indicate that it would not be inequitable to shift liabilty to Camarotti. While employees who act loyally and in good faith will not ordinarily be held responsible for executing contracts in excess of their actual authority, *see Tel-Ads, Inc. v Trans-Lux Playhouse, Inc.*, 232 F Supp 198 (D DC 1964), Camarotti's alleged insubordination

presents a different sort of case. To foreclose indemnification as a matter of law would permit virtually any employee, regardless of position, to seriously impair corporate operations and goodwill by binding the employer to potentially unconscionable contracts.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that the third-party defendant's motion to dismiss is granted as to the first cause of action for contribution, and that claim is severed and dismissed, and denied as to the second cause of action for indemnification; and it is further

ORDERED that a Status Conference will be held on March 7, 2012 at 11:30 a.m. at 60 Centre Street, Rm. 218; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: January 31, 2012

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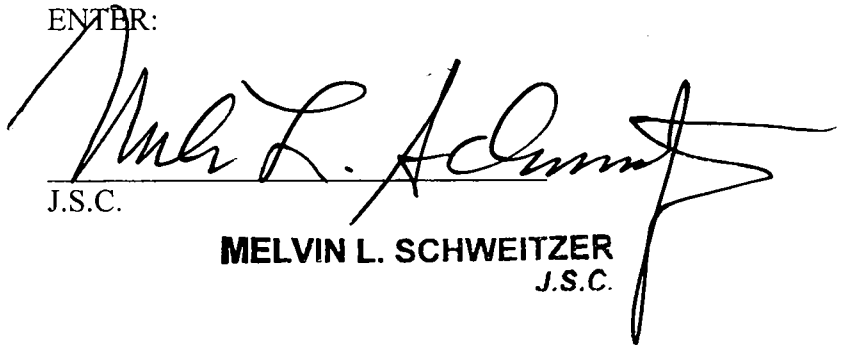

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.