

**Plymouth Fin. Co., Inc. v Plymouth Park Tax Servs.,
LLC**

2013 NY Slip Op 33177(U)

April 17, 2013

Supreme Court, New York County

Docket Number: 651185/2012

Judge: O. Peter Sherwood

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: O. PETER SHERWOOD
Justice

PART 49

PLYMOUTH FINANCIAL COMPANY, INC.,

Plaintiff,

INDEX NO. 651185/2012

-against-

MOTION DATE April 9, 2013

PLYMOUTH PARK TAX SERVICES LLC,

MOTION SEQ. NO. 001

Defendant.

MOTION CAL. NO.

The following papers, numbered 1 to were read on this motion for summary judgment.

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

PAPERS NUMBERED

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: [X] Yes [] No

Upon the foregoing papers, it is ordered that this motion for summary judgment is decided in accordance with the accompanying decision and order.

Dated: April 17, 2013

[Signature]
O. PETER SHERWOOD, J.S.C.

Check one: [X] FINAL DISPOSITION [] NON-FINAL DISPOSITION

Check if appropriate: [] DO NOT POST

[] REFERENCE

[] SUBMIT ORDER/ JUDG.

[X] 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: COMMERCIAL DIVISION PART 49**

-----X
PLYMOUTH FINANCIAL COMPANY, INC.,

DECISION AND ORDER

Plaintiff,

**Index No. 651185/2012
Mot Seq. No. 001**

- against -

PLYMOUTH PARK TAX SERVICES LLC,

Defendant.

-----X
O. PETER SHERWOOD, J.:

Plaintiff Plymouth Financial Company, Inc. (“Plymouth Financial”) moves, pursuant to CPLR 3212, for summary judgment on its single cause of action for breach of contract. Defendant, Plymouth Park Tax Services LLC (“Plymouth Park”), cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint, and alternatively moves, pursuant to CPLR 3025 (b), for leave to amend its answer.

BACKGROUND

This contract dispute stems from the parties’ differing interpretations of certain provisions of an Asset Purchase Agreement (“APA” or the “Agreement”). The essential facts are undisputed.

Plymouth Financial was engaged in the business of purchasing and servicing tax lien receivables secured by residential and commercial properties. The firm has ceased business operations and is in the process of winding down its affairs.

Plymouth Financial (and certain of its stockholders) and Plymouth Park, a wholly-owned subsidiary of The Bear Stearns Companies, Inc. (“Bear Stearns”), entered into the APA as of January 18, 2006 (the “Closing Date” under the terms of the APA). JPMorgan Chase & Co. (“JPM”) acquired Bear Stearns on May 30, 2008, and thereafter, Plymouth Park became a wholly-owned subsidiary of JPM. Under the terms of the APA, Plymouth Park, the buyer, agreed to purchase from Plymouth Financial, the seller, certain “Acquired Assets” (as defined in the APA) for a price of \$25,847,812, including a “Post-Closing Payment” of \$1,000,000 plus interest from the Closing Date to the date of payment. The Post-Closing Payment was to be reduced by any liabilities incurred in connection with the action captioned, *Municipal Revenue Services, Inc. v XSPAND, Inc. and Bear*

Stearns & Co., Inc., 05-CV-671, then pending in the United States District Court for the Middle District of Pennsylvania (the “MRS Litigation”). XSPAND, Inc., a defendant in the MRS Litigation, was a wholly-owned subsidiary of Plymouth Financial. On the Closing Date, XSPAND, Inc. and Bear Stearns were represented in the MRS Litigation by the law firm, K&L Gates LLP (“K&L Gates”) and had retained Dr. Peter Knutson as an expert concerning accounting and financial matters. Thereafter, JPM, the successor in interest to Bear Stearns, objected to the continuing employment of Knutson, because Knutson was designated as the expert witness adverse to JPM in an unrelated matter. As a result, K&L Gates withdrew as Bear Stearns’ counsel, but continued as counsel for XSPAND. Montgomery, McCracken, Walker & Rhoads, LLP (“MMWR”) was substituted in for Bear Stearns. The Post-Closing Payment was due and payable when liability, if any, was finally determined and satisfied in the MRS Litigation.

On July 20, 2011, the jury in the MRS Litigation returned a verdict in favor of XSPAND, Inc. and Bear Stearns on all claims. Judgment was entered dismissing the complaint on July 27, 2011. In this case, Plymouth Financial alleges that Plymouth Park has breached the APA by failing to pay the full amount of the Post-Closing Payment.

DISCUSSION

I. The Applicable Provisions of the APA

The relevant provisions of the APA are as follows:

Section 1.5(b)(vi) provides:

(vi) (A) upon the final determination, as determined by the Buyer in its sole discretion, of the liabilities of the Seller in connection with litigation matters identified from time to time by the Buyer in its sole discretion, the Buyer shall pay to such plaintiffs as the Buyer may identify in its sole discretion the amount of such liabilities, not to exceed \$1,000,000 in the aggregate, and (B) at such time as the Buyer has determined, in its sole discretion, that all such liabilities of the Seller have been satisfied, the Buyer shall pay to the Seller, an aggregate amount equal to \$1,000,000 reduced by the amounts paid pursuant to the preceding clause (A), with interest at the Federal Funds Rate from the Closing Date to the date of payment, in each case subject to the provisions of Section 8;

Section 8.1(a)(v) provides:

8.1. Indemnification by Seller. (a) Subject to the limitations set forth in this Section 8, the Seller shall indemnify and hold harmless the Buyer and each Person, if any, who controls or may control the Buyer within the meaning of the Securities Act of

1933 (and the rules and regulations thereunder), and their respective officers, directors, employees, agents and advisors (each such indemnitee being referred to herein as a 'Buyer Indemnified Person'), from and against any and all losses, costs, damages, liabilities, obligations, assessments, fines, Taxes, deficiencies and expenses arising from Taxes, claims, demands, actions or causes of action, including reasonable legal fees (collectively, 'Damages'), in connection with or arising out of:

...

(v) all costs, expenses and other Damages incurred by Bear Stearns or any of its Affiliates in connection with or arising out of the MRS Litigation, whether arising before or after the Closing.

Section 8.6 provides:

8.6. Third Party Claims. If the claim or demand set forth in the Notice of Claim given by the Indemnified Party pursuant to Section 8.4 of this Agreement is a claim or demand asserted by a third party (a "Third Party Claim"), the Indemnifying Party shall have fifteen (15) days after the date of the Notice of Claim to notify the Indemnified Party in writing of its election to defend such Third Party Claim on behalf of the Indemnified Party with counsel selected by the Indemnifying Party; provided, however, that prior to assuming the defense of a Third Party Claim, the Indemnifying Party shall have first acknowledged its obligation to indemnify the Indemnified Party in respect of all Damages associated therewith (together with the Damages associated with all other unresolved claims for indemnification) would reasonably be expected to exceed the aggregate amount of the Subsequent Payments then available for set-off. If the Indemnifying Party elects to defend such Third Party Claim, the Indemnified Party shall make available to the Indemnifying Party and its agents and representatives all available records and other materials which are reasonably required in the defense of such Third Party Claim and shall otherwise cooperate with and assist the Indemnifying Party in the defense of such Third Party Claim, and so long as the Indemnifying Party is diligently defending such Third Party Claim, the Indemnified Party shall not pay, settle or compromise such third party claim or demand without the Indemnifying Party's prior written consent (which consent shall not be unreasonably withheld); provided, however, that no such consent of the Seller shall be required where the Third Party Claim could adversely affect the business reputation of the Buyer or its Affiliates, or could result in criminal liability of the Buyer or its Affiliates or any of their respective officers, directors or employees. *If the Indemnifying Party elects to defend such Third Party Claim, the Indemnified Party shall have the right to participate in the defense of such Third Party Claim, at its own expense.* Notwithstanding the foregoing, the Indemnifying Party shall not be entitled to assume the defense of any Third Party Claim (and shall be liable for the fees and expenses of one counsel in each jurisdiction incurred by the Indemnified Party in defending such Third Party Claim) if the Third Party Claim seeks an order, injunction or other equitable relief or relief for other than money damages against the Indemnified Party. *If for any reason the Indemnifying Party does*

not assume the defense of such Third Party Claim, or does not diligently defend such Third Party Claim, the Indemnified Party shall have the right, in addition to any other right or remedy it may have hereunder, at the Indemnifying Party's expense, to defend such Third Party Claim; provided, however, that (a) the Indemnified Party shall not have any obligation to participate in the defense of, or defend any such Third Party Claim; and (b) the Indemnified Party's defense of or its participation in the defense of any such Third Party Claim shall not in any way diminish or lessen the obligations of the Indemnifying Party under this Section 8. In addition, the Indemnifying Party shall be liable for the fees and expenses of one counsel in each jurisdiction employed by the Indemnified Party for any period during which the Indemnifying Party has not assumed the defense thereof.

(italics emphasis added).

Section 8.7 provides:

8.7. Set-Off Against Subsequent Payments. Any amounts due and payable to a Buyer Indemnified Person from the Seller in accordance with this Section 8 may be set-off by the Buyer against any Subsequent Payments which have not yet been paid to the Seller.

Section 8.2(a)(ii) provides:

8.2. Indemnification by Buyer. (a) Subject to the limitations set forth in this Section 8, the Buyer shall indemnify and hold harmless the Seller and its officers, directors, employees, agents and advisors (each such indemnitee being referred to herein as a "Seller Indemnified Person"), from and against any and all Damages, in connection with or arising out of:

...

(ii) any breach or default of any of the covenants or agreements given or made by the Buyer in this Agreement or any Ancillary Agreement, or in any Ancillary Agreement, or in any exhibit, schedule, certificate or instrument attached or delivered pursuant hereto or thereto;

II. Interplay of Section 8.1(a)(v) and Section 8.6

Focusing its arguments on Section 8.6, Plymouth Financial argues that it is entitled to recover the full amount of the \$1,000,000 Post-Closing Payment plus interest. Specifically, it contends that it provided Plymouth Park with a successful defense in the MRS Litigation through K&L Gates. Plymouth Financial contends that Plymouth Park's election to switch counsel from K&L Gates to MMWR was to be taken at Plymouth Park's own expense, and may not be set-off against the Post-Closing Payment. In support of this argument, plaintiff relies on the portion of Section 8.6 which

states, “[i]f the Indemnifying Party elects to defend such Third Party Claim, the Indemnified Party shall have the right to participate in the defense of such Third Party Claim, at its own expense.”

Plymouth Park replies that it should be awarded summary judgment because it is entitled to set-off its legal costs incurred in the MRS Litigation against the Post-Closing Payment. Plymouth Park argues that Section 8.1(a)(v) conflicts with Section 8.6, and thus as the more specific section, Section 8.1(a)(v), must control. Section 8.1(a)(v) requires Plymouth Financial to pay “*all* costs, expenses and other Damages incurred by Bear Stearns or any of its Affiliates in connection with or arising out of the MRS Litigation, whether arising before or after the Closing” (emphasis added). “Damages” is defined to include legal fees.

In construing contracts, courts must adopt an interpretation which gives meaning to every provision, and “no provision of a contract should be left without force and effect” (*Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46 [1956]). Where there is “an inconsistency between a specific provision and a general provision of a contract . . . , the specific provision controls” (*id.*; see also *Oakgrove Const. v Genesee Valley Nurseries*, 39 AD3d 1283, 1284 [4th Dept 2007]; *DBT GmbH v J.L. Min. Co.*, 544 F Supp 2d 364, 377-378 [SD NY 2008]).

Here, Section 8.1(a)(v) is more specific in the sense that it identifies a particular covered claim, whereas Section 8.6 speaks to third party claims not specifically identified on the Closing Date. Defendant admits that the MRS Litigation is a third party claim, but argues that since indemnification of costs incurred by Bear Stearns in the MRS Litigation is specifically covered by Section 8.1(a)(v), the general provisions of Section 8.6 do not apply. Defendant avers that Section 8.6 applies merely to *future* third party claims, and not claims, such as the MRS Litigation, that the parties specifically identified at the time of the Agreement. Defendant adds that application of Section 8.6 to the MRS Litigation would read Section 8.1(a)(v) out of existence.

Plymouth Financial disagrees. It argues that Section 8.1(a)(v) applies as modified by Section 8.6. Plaintiff notes that Section 8.1(a) begins with the words “[s]ubject to the limitations set forth in this Section 8 . . .” and argues that these words limit plaintiff’s indemnification obligations under Section 8.1(a)(v). Plaintiff maintains that Section 8.6 is actually the more specific provision, and that the “‘general’ liability provisions of Section 8.1(a)(v) are subject to the ‘specific’ limitations of the remainder of Section 8.”

Section 8.6 was intended to apply to future third-party claims, while Section 8.1(a)(v) was intended to apply specifically to the MRS Litigation. Although as defendant asserts, the words “potential” or “future” claims do not appear in Section 8.6, one must look at the entire language of Section 8.6 as well as the text of Section 8.4 to glean the purpose of Section 8.6. Section 8.6 begins; “Third Party Claims. If the *claim or demand set forth in the Notice of Claim given by the Indemnified Party pursuant to Section 8.4 of this Agreement is a claim or demand asserted by a third party (a ‘Third Party Claim’)*, the Indemnifying Party shall have fifteen (15) days after the date of the Notice of Claim to notify the Indemnified Party in writing of its election to defend such Third Party Claim on behalf of the Indemnified Party with counsel selected by the Indemnifying Party and reasonably acceptable to the Indemnified party; . . .” (italics emphasis added). Thus, the definition of “Third Party Claim” contemplates a claim in which a Notice of Claim is given pursuant to Section 8.4. Section 8.4 provides, in relevant part, that “[p]romptly upon obtaining knowledge that any claim, event, statement of facts or demand has given rise to, or would reasonably be expected to give rise to, a claim for indemnification hereunder, the Indemnified Party shall give written notice of such claim or demand (a “Notice of Claim”) to the Indemnifying Party, setting forth the amount of the claim (if known).”

Neither §8.1(v) nor §8.6 expressly addresses how litigation defense costs should be allocated where a party to the APA elects to hire its own counsel to continue its defense of a litigation which, on the Closing Date, the parties were defending jointly, as is the case here. However, the APA sets forth a framework for allocation of such costs. Pursuant to §8.6, the indemnified party has the option to (a) accept the defense offered by the indemnifying party with all costs to be assumed by the party providing the defense, or (b) accept the defense offered by the indemnifying party while preserving active participation in the defense through its own counsel at its own expense. Further, where the complaint seeks other than money damages, the indemnified party has the option to assume its own defense and have the cost of that defense paid by the indemnifying party. Notably in such circumstances, the indemnifying party is only “liable for the fees and expenses of *one counsel* in each jurisdiction” (emphasis added). Accordingly, the parties contemplated that the indemnifying party would assume the fees and expenses incurred in defense of third party litigation but that the

indemnifying party would not be obligated to pay incremental costs the indemnified party elects to incur.

In this case, a conflict arose as a result of the acquisition of Bear Steans by JPM. JPM then determined to continue its participation in the case using separate counsel after XPAND declined to discharge the parties' expert who was adverse to JPM in an unrelated litigation. The result was an increase of defense fees and expenses in the MRS Litigation. Prior to the acquisition, plaintiff was providing a diligent defense and continued to do so thereafter until counsel was replaced. Plymouth Financial cannot be required to pay the cost of additional counsel which was not a result of any delinquency by plaintiff and which the parties did not expressly contemplate at the time the APA was signed.

III. The Settlement Agreement

Defendant contends that if Section 8.1(a)(v) does not apply and if Section 8.6 is applicable, this suit is nevertheless barred by a settlement agreement. Defendant relies on an email from Paul Scura, acting on behalf of Plymouth Financial, which includes the following: "I trust Eric told you that notwithstanding the fact we disagree with your analysis regarding the tax language in the [APA], *we will accept your proposed payout*. Attached is an assignment agreement assigning Plymouth's rights to one of its wholly owned subsidiaries. Please make sure it is acceptable to you. I await your release language. We would hope that we can wrap this up this week. Please confirm" (emphasis added). A release was never executed, but Defendant nonetheless contends that a settlement agreement was reached, thereby barring this suit. Defendant relies on *Kowalchuk v Stroup* (61 AD3d 118 [1st Dept 2009]) for the proposition that, as stated by defendant, "[t]he mere fact that the parties to an agreement intended to draft formal settlement papers is not alone enough to imply an intent not to be bound except by a fully executed document." In reply, plaintiff raises several arguments, including lack of consideration. The purported settlement was merely the Post-Closing Payment minus the defendant's legal costs in the MRS Litigation. As this obligation was already owed to plaintiff, it contends that there is a lack of consideration.

In any event, defendant's argument that there is a settlement agreement is belied by a letter from Sidley Austin LLP, Plymouth Park's transactional counsel (Scura Reply Aff. Ex. E). In that letter, Sidley states that "Buyer is still willing to pay \$425,000 to Seller on the condition that Seller

execute an acceptable release.” This letter is dated, April 17, 2012, after the date defendant contends a settlement was reached. It is thus clear that on that date, defendant did not believe a settlement agreement was in place. Accordingly, there is no settlement agreement.

Plaintiff’s motion for summary judgment must be granted and the cross-motion denied. Plaintiff is not obligated to shoulder the incremental cost of the MRS Litigation incurred on the initiative of defendant. Even if defendant had pleaded set-off pursuant to §8.7 of the APA, the claim must be rejected. Pursuant to §8.2(a)(ii) of the APA, plaintiff is entitled to be reimbursed for its reasonable attorney fees and expenses incurred in this litigation.

Accordingly, it is hereby

ORDERED that plaintiff’s motion for summary judgment is **GRANTED** and defendant’s cross-motion for summary judgment is **DENIED**; and it is further

ORDERED that defendant’s cross-motion for leave to amend the answer is **DENIED** as moot; and it is further

ORDERED that plaintiff shall settle a judgment on notice; and it is further

ORDERED that the portion of the plaintiff’s action that seeks the recovery of attorney’s fees is severed and the issue of the amount of reasonable attorney’s fees plaintiff may recover against the defendant, Plymouth Park Tax Services LLC, is referred to a Special Referee to hear and determine; and it is further


ORDERED that counsel for the plaintiff shall, within fourteen (14) days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee’s Part for the earliest convenient date; and it is further

ORDERED that upon determination by the Special Referee of the amount of attorney’s fees due to plaintiff, plaintiff shall have leave to enter a Clerk’s judgment in such sum together with costs and disbursements as taxed by the Clerk.

This constitutes the decision and order of the Court.

DATED: April 17, 2013

ENTER,


O. PETER SHERWOOD
J.S.C.