

<b>Denenberg v Schaefer</b>
2016 NY Slip Op 31044(U)
June 9, 2016
Supreme Court, Suffolk County
Docket Number: 600680/2015
Judge: Jerry Garguilo
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**SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY**

**PRESENT:**

**HON. JERRY GARGUILO  
SUPREME COURT JUSTICE**

**ROBERT DENENBERG,**

Plaintiff,

-against-

**RICHARD SCHAEFER,**

Defendant.

<b>ORIG. RETURN DATE: 4/30/15</b> <b>FINAL SUBMITTED DATE: 5/27/15</b> <b>MOTION SEQ#001</b> <b>MOTION: MG</b>
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The Defendant Richard Schaefer, petitions the Court by way of motion for an order dismissing the Complaint. The Plaintiff opposes the application in all respects.

In rendering its decision, the Court has considered the Defendant's Notice, Affirmation of Counsel in Support of the Motion to Dismiss with Exhibit A (the Subscription Agreement), the Defendant's Memorandum of Law in Support of his motion, the Affirmation of Plaintiff's Counsel submitted in opposition with Exhibit A, the Plaintiff's Memorandum of Law in Opposition to Defendant's motion to dismiss and the Reply Memorandum of Law In Further Support of the Defendant's Motion To Dismiss.

This is an action to recover damages in the amount of One Hundred Sixty Two Thousand Two Hundred Ninety Seven Dollars and Thirteen Cents (\$162,297.13) for breach of an indemnification agreement. The Defendant, Richard Schaefer, it is alleged, promised to indemnify the Plaintiff, Robert Denenberg for losses in connection with Denenberg's investment in a company Schaefer founded, Liquid Holdings Group, LLC. In total, Denenberg lost Two Hundred Thirty Seven Thousand Two Hundred Ninety Seven Dollars and Thirteen Cents (\$237,297.13) in the investment. Schaefer paid Seventy Five Thousand Dollars (\$75,000) to Denenberg, but as per the Complaint "defaulted on the balance."

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Liquid Holdings Group was a Delaware limited liability company formed on January 17, 2012. In July 2013, Liquid Holdings Group reorganized as a Delaware corporation and changed its name to Liquid Holdings Group, Inc. for purposes of becoming a publicly traded company.

The founders of Liquid Holdings Group LLC included the Defendant Richard Schaefer. It is undisputed that Schaefer and Denenberg (Plaintiff and Defendant) were longtime friends and worked in the same industry. Schaefer was Chairman of the commodity exchange, NYMEX, and Denenberg was a member of NYMEX. The Plaintiff claims that on or about late 2012 through early 2013, Schaefer became involved in capital raising for Liquid Holdings Group, Inc. The Complaint alleges that “at that time, Schaefer was LHG’s executive Chairman.” To that end, Schaefer solicited funds from business associates, including the Plaintiff.

The Complaint alleges that Denenberg was reluctant to invest. The Complaint alleges that Schaefer not only wanted Denenberg’s money to help finance the company, but he also believed that if respected investors such as Denenberg partook in financing, others would follow.

The Plaintiff alleges that Denenberg told Schaefer that he did not want to invest, that he did not want to lose money, and that he did not want to invest with friends. The Complaint further alleges that in response, Schaefer told Denenberg that if he invested, Schaefer would indemnify Denenberg for any losses as a result of the investment. Thereafter, the Plaintiff claims that upon Schaefer’s promise and personal guarantee to cover any losses that Denenberg might suffer as a result of the investment, on or about February 12, 2013, Denenberg subscribed for, and ultimately acquired 36,387 shares in the company at a price of Eight Dollars and Twenty Four Cents (\$8.24) per share.

Of course, and the reason we are in litigation is that the stock fell. The Plaintiff claims that he was alarmed at the steady decline of the stock. He called Schaefer numerous times expressing concerns about the stock’s performance and indicating his desire to sell some or all of the stock. His complaints were met with optimistic assurances about the company’s future.

All parties concede that the Defendant, Richard Schaefer, paid the plaintiff Seventy Five Thousand Dollars (\$75,000) for some purpose. The Plaintiff claims the purpose was to fulfill his promise to indemnify. The Defendant claims the purpose was more as a moral obligation, and nothing binding in a contractual sense.

The Defendant’s claim of no liability, responsibility or obligation to the Plaintiff rests

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on the fact that the Subscription Agreement executed by the Plaintiff for his interest in the company prior to the IPO warrants on behalf of the Plaintiff as follows:

In making the decision to acquire the purchased units, the buyer is not relying on representations of any officer, director, member, or agent of the company... disagreement constitutes the entire agreement between the parties hereto, and with respect to the subject matter hereof and shall supersede all previous oral and written and all contemporaneous oral negotiations, commitments and understandings.

In response, the Plaintiff raises an interesting issue, suggesting that the issue before the Court is not one of the parole evidence rule, but of the "collateral agreement rule."

As pointed out by the Plaintiff, the crux of Schaefer's argument for dismissal based upon the Subscription Agreement is the parole evidence rule. The rationale of that rule, as stated by Professor Farnsworth, in his Treatise is as follows:

The parties to a contract often reduce to writing, part or all of their agreement, following negotiations during which they have given assurance, made promises, and reached understandings. They do this in order to provide trustworthy evidence of the facts and terms of their agreement and to avoid reliance on uncertain memory. However, should litigation ensue, one party may seek to introduce evidence of the earlier negotiations in an effort to show that the terms of the agreement are other than as shown on the face of the writing. The party will be met with a rule known as the "parole evidence rule," which may bar the use of such extrinsic evidence to contradict and perhaps even to supplement the writing. 2 Farnsworth, Contracts § 7.2[3rd edition 2004].

A "merger clause" operates to "require full application of the parole evidence rule in order to bar the introduction of extrinsic evidence to alter, vary or contradict the terms of a written agreement." *Matthius v. Platinum Estates, Inc.*, 74 A.D.3d 908.

The Plaintiff claims that the clause in this Subscription Agreement, upon which the Defendant relies in his "misbegotten effort" against Denenberg's contract claim, is a typical merger clause.

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The Plaintiff suggests that the parole evidence rule “has no application... to an oral collateral contract separate from, and independent of, the written contract.” Jerome Prince, Richardson on Evidence § 11-306 seq. [Farrell 11th Edition 1995]. This is known as the “collateral agreement rule.” The rule excludes from the parole evidence rule “a purely collateral contract, distinct from, and independent of, the written agreement.” However, it appears to the Court that the purported collateral agreement is not distinct from and/or independent of the written agreement.

The Defendant points out that since the Defendant is in fact an officer of the company the “collateral contract” rule is inapplicable as the subscription language encompasses “officers.”

Although the Notice of Motion does not identify the statutory basis of the motion, Plaintiff’s Memorandum of Law seems to indicate that the statutory basis lies somewhere in CPLR §§ 3211(a)(1), 3211(a)(7) and 3211(c). In substantial part, the motion seeks to avoid Schaefer’s alleged “contractual obligation” i.e. the indemnification agreement based on the terms of the subscription agreement that Denenberg executed in connection with his investment.


CPLR § 3211(a)(1) provides in relevant part that “a party may move for judgment dismissing one or more causes of action asserted against him on the ground that...a defense is founded upon documentary evidence...” Under this provision, a motion to dismiss will be granted only if the documentary evidence resolves “all factual issues as a matter of law, and conclusively disposes of Plaintiff’s claim.” *Fontanetta v. John Doe 1*, 73 A.D.3d 78, 83-4 [2nd Dept. 2010].

As an aside, the Court considered the application of General Obligations Law § 5-701, subd. 1, requiring a writing if the agreement, by its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime.

The Defendant’s Petition is **GRANTED**.

The foregoing constitutes the decision and **ORDER** of this Court.

**Dated: July 7, 2015**

  
HON. JERRY GARGUILO, JSC