SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
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HOWARD J. KAPLAN and MICHELLE A. RICE,

Plaintiffs,

-against-

ATLANTIC SPECIALITY INSURANCE COMPANY,

Defendant.

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Index No.: 652860/2016

Mtn Seq. No. 001

DECISION AND ORDER

JEFFREY K. OING, J.:

Relief Sought

Plaintiffs, Howard Kaplan ("Kaplan") and Michelle Rice ("Rice"), move, pursuant to CPLR 3213, for summary judgment in lieu of complaint. In that regard, they seek an order directing Atlantic Specialty Insurance Company ("Atlantic") to: (1) pay $513,147.16, plus interest to Arkin Kaplan Rice LLP ("AKR"); and (2) pay plaintiffs Kaplan Rice $847.72 in costs.

Factual Background

This litigation has its roots in the four-year dispute between Stanley S. Arkin ("Arkin"), Kaplan, and Rice, all of which were named partners in AKR, arising out of AKR's dissolution. AKR commenced an action against Kaplan, Rice, and Kaplan Rice LLP on July 2, 2012 under Index No. 652316/2012 (the "AKR Action") asserting, inter alia, claims for breach of fiduciary duty, tortious interference with contract, and

declaratory and injunctive relief. During the pendency of the action, on November 28, 2012, Arkin transferred $513,147.16 from AKR's bank account at Signature Bank, purportedly to pay certain AKR creditors (Collins Aff. ¶¶ 4-5). Kaplan and Rice immediately sought an order directing AKR, Arkin, and another AKR attorney, Lisa Solbakken ("Solbakken", together with AKR and Arkin, the "Arkin Parties") to restore these funds (AKR Action, NYSCEF Doc. No. 81).

In an order dated December 3, 2012, Justice O. Peter Sherwood directed Arkin and Solbakken to restore the transferred $513,147.16 to the AKR account (the "Repayment Order") (Repayment Order at ¶ 1, Allegaert Affirm., Ex. 3). On December 5, 2012, the Arkin Parties appealed the Repayment Order (AKR Action, NYSCEF DOC. No. 99). At that time, Atlantic issued an Undertaking on Appeal (the "Undertaking"), providing that "if the [Repayment Order] ... or any part of it, is affirmed, or the appeal dismissed, the Appellants [i.e., the Arkin Parties] shall pay the sum directed to be paid by the [Repayment Order] plus interest and costs" (Undertaking, Allegaert Affirm., Ex. 4). On February 11, 2013, Justice Sherwood ordered an accounting of AKR's assets (2/11/13 Decision and Order, AKR Action, NYSCEF Doc. Nos. 177, 178).

On August 21, 2014, the Appellate Division, First Department affirmed the Repayment Order with costs, and directed the Arkin Parties to, among other things, "return [the] money to plaintiff Arkin Kaplan Rice LLP's (AKR) account at Signature Bank forthwith" (Allegaert Affirm., Ex. 5). On May 26, 2015, the First Department denied the Arkin Parties' motion for reargument or leave to appeal (Allegaert Affirm., Ex. 6).

On June 16, 2015, AKR, Arkin, and Solbakken moved to vacate the Repayment Order. This Court denied this motion, rejecting the AKR Parties' argument that the Undertaking should be reduced by $311,901.47 that the AKR Parties claimed they had already paid because the Court could not, during the relevant time period, determine whether this payment had been made (4/26/16 Decision and Order at pp. 8-9, AKR Action, NYSCEF Doc. No. 1444). I held that the effect of the Repayment Order would be revisited after completion of the accounting previously ordered by Justice Sherwood and referred the AKR Action to a Special Referee to hear the parties' objections to this accounting (Id. at p. 20). This hearing is pending.

By letter dated June 9, 2015, Kaplan and Rice demanded that the Arkin Parties pay the full $513,147.16 plus interest as well as their costs of appeal (Allegaert Affirm., Ex. 7). The Arkin

Parties refused to do so (Allegaert Affirm., Ex. 11). Kaplan and Rice sent two letters to Atlantic demanding payment of the Undertaking (Allegaert Affirm., Ex. 8). Atlantic responded by letter dated May 23, 2016 explaining that it would not make any payment because the Special Referee had yet to resolve the issue of what amounts, if any, remained outstanding under the Repayment Order (Allegaert Affirm., Ex. 12).

Discussion

For summary judgment to be granted pursuant to CPLR 3213, plaintiffs must establish that defendant: (1) entered into an agreement for the payment of money only and (2) failed to make the payments called for under the agreement (Boland v Indah Kiat Fin. (IV) Mauritius Ltd., 291 AD2d 342, 343 [1st Dept 2002]). The parties do not dispute that the Undertaking is an "instrument for the payment of money only," as it "provides for payment of a sum certain upon the easily verified failure of specified events" (Bankers Trust Co. v Nat'l Union Fire Ins. Co. of Pittsburgh, 261 AD2d 286 [1st Dept 1999]). This fact, in conjunction with plaintiffs' submission of an affidavit from Rice averring that Atlantic has not made any payment on the Undertaking establishes plaintiffs' prima facie entitlement to CPLR 3213 relief against Atlantic (Poah One Acquisition Holdings V Ltd. v Armenta, 96 AD3d

560 [1st Dept 2012]). In order to avoid summary judgment, Atlantic must demonstrate the existence of a triable issue of fact (SCP (Bermuda) Inc. v Bermudatel Ltd., 224 AD2d 214, 216 [1st Dept 1996]). Atlantic has done so.

Here, an issue of fact exists as to whether the amount owed under the Repayment Order has been satisfied, in whole or in part. The affidavit of Kris Collins, AKR's office manager -- submitted by defendant along with related AKR accounting records -- indicates that $311,901.47 of the amounts at issue under the Repayment Order was repaid to AKR in or around December 2012, while the remaining $201,245.69 was paid to AKR by the Arkin Parties on May 20, 2016 (Collins Aff., ¶¶ 6-10).

Contrary to plaintiffs' claims, this defense is not extrinsic to the Undertaking but, in fact, stems directly from it (Cf. New Rochelle Dodge, Inc. v. Bank of N.Y., 127 AD2d 638, 639 [2d Dept 1987] [defendant's claim for a setoff based on nine unrelated contracts were extrinsic to the contracts upon which the plaintiff sued]). Moreover, plaintiffs' argument that the Undertaking obligates Atlantic to satisfy the Repayment Order regardless of whether the AKR Parties have paid the amounts owed thereunder is incorrect. The plain language of the Undertaking provides that the Arkin Parties will make the payment to satisfy

the Repayment Order. In light of this contractual requirement, Atlantic is obligated to pay only those amounts that the Arkin Parties fail to pay. Whether the Arkin Parties have made any such payments is a factual issue that will be resolved by the Special Referee's determination of the parties' objections to the final accounting in the AKR Action.

Accordingly, plaintiffs' motion for summary judgment in lieu of complaint is denied (G&L Indus., Inc./Old Action Labs, Inc. v Bell Bates Co., Inc., 293 AD2d 511, 512 [2d Dept 2002]).

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that plaintiffs' moving papers (NYSCEF Doc. Nos. 1-18, 45) are hereby deemed the complaint in this action and defendant's answering papers (NYSCEF Doc. No. 22-44) are hereby deemed the answer; and it is further

ORDERED that this action is stayed pending resolution of the pending accounting reference before the Special Referee.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 10/17/16

HON. JEFFREY K. OING, J.S.C.

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J.S.C.