

GDC Bridgeport Holdings, LLC v Anderson
2017 NY Slip Op 30997(U)
May 9, 2017
Supreme Court, New York County
Docket Number: 654120/16
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 61

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GDC BRIDGEPORT HOLDINGS, LLC, individually and
on behalf of BRIDGEPORT PHASE I MANAGER, LLC,
BRIDGEPORT PHASE I OWNER, LLC, BRIDGEPORT
PHASE I TENANT LLC, BRIDGEPORT PHASE I
COMMERCIAL LLC, BRIDGEPORT PHASE I
DEVELOPER, LLC, BRIDGEPORT PHASE II MANAGER
LLC, BRIDGEPORT PHASE II OWNER LLC, BRIDGEPORT
PHASE II TENANT LLC, BRIDGEPORT PHASE II
COMMERCIAL LLC , and BRIDGEPORT PHASE II
DEVELOPER, LLC,

Plaintiffs,

Index No.654120/16

-against-

Mot Seq No. 003

ERIC ANDERSON, URBAN GREEN BRIDGEPORT
PHASE I LLC, URBAN GREEN BRIDGEPORT PHASE
II LLC, URBAN GREEN MANAGEMENT, LLC, URBAN
GREEN EQUITIES, LLC, URBAN GREEN COMMERCIAL
BUILDERS, LLC, UGE BRIDGEPORT, LLC, URBAN
GREEN BUILDER/CT, LLC, UGE 912 MM LLC, UGE
912 LLC, BLOCK 912 JV, LLC, UNKNOWN MEMBERS
OF BLOCK 912 JV, LLC 1-3, SUPPORTIVE HOUSING
WORKS, INC., and John Does 1 through 20,

Defendants.

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OSTRAGER, J.:

Before the Court is a motion by defendants Urban Green Bridgeport Phase I LLC (UGB I) and Eric Anderson for summary judgment finding that defendants are entitled to the Advancement of Expenses pursuant to § 11.3 of the Manager's Operating Agreement. As explained at greater length in prior decisions by this Court, this action involves a complex series of transactions regarding a major multi-phase urban renewal project in Bridgeport, Connecticut that began in or about 2005 and is continuing. Plaintiff GDC Bridgeport Holdings, LLC is an investor with an equity interest in the Bridgeport project. The defendants are various special purpose entities formed in connection with the project, and defendant Anderson is one of the principals.

Plaintiffs in this action seek to hold moving defendants UGB I and Anderson jointly and severally liable for millions of dollars in damages purportedly incurred as a result of defendants' alleged fraud and breach of fiduciary duty. In this motion, the moving defendants seek an "Advancement of Expenses" to indemnify them for attorney's fees incurred defending this action and bringing this motion.

In addition to filing the instant Order to Show Cause after plaintiffs declined defendants' demand for Advancement of Expenses, the moving defendants filed a counterclaim seeking the same relief to protect against any argument that the issue needed to be raised as a claim in an action, rather than by way of motion. At the May 4, 2017 oral agreement, the parties narrowed the issues in dispute by stipulating that this Court may decide the Advancement of Expenses issue on the merits, irrespective of what the Agreement provides, and that the controlling statute is the Delaware Uniform Limited Liability Act.

Plaintiffs vigorously dispute that the Advancement of Expenses clause applies to entitle defendants to the reimbursement of their attorney's fees incurred in defending the claims asserted in this action; plaintiffs insist that the clause does not extend to claims between the parties to the Agreement, but rather, only to claims brought by third parties.¹ While not adopting this argument fully, the Court finds that defendants have failed to meet their burden on summary judgment to prove that the controlling Act and

¹ In the alternative, plaintiffs claim that at most, defendants would be entitled to expenses necessary to respond to the first cause of action, as that is the only one of nine that arguably relates to defendants' conduct as Members or Representatives of Phase I Manager. By letter following the oral argument, defense counsel confirmed that the "movants only seek to establish their *right* to advancement, and to recover fees incurred in establishing that right," confident that counsel could resolve other issues.

Agreement unequivocally mandate a finding that defendants are entitled to the Advancement of Fees they seek at this time. To the extent the wording in defendants' Order to Show Cause attempts to shift the burden to plaintiffs pursuant to § 11.4 of the Agreement, the Court finds the language in the cited provision is insufficient to change the rule that the burden on summary judgment is on the movant to demonstrate its entitlement to relief as a matter of law. See CPLR § 3212(b).

The Court turns first to the Delaware Uniform Limited Liability Act, which both parties agreed at oral argument is the only statute that applies.² Section 18-108 of the Act leaves it to the parties to agree upon the indemnification provisions they choose, providing that:

Subject to such standards and restrictions, if any as are set forth in its limited liability company agreement, a limited liability company may, and shall have the power to, indemnify and hold harmless any member or manager or other person from and against any and all claims and demands whatsoever.

See also, *Majkowski v Am. Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 591 (Del. Ch. 2006) (noting that the Act gives the parties to an agreement "complete freedom of contract").

The general rule in Delaware is that "indemnity agreements are presumed *not* to require reimbursement for attorneys' fees incurred as a result of substantive litigation between the parties to the agreement absent a clear and unequivocal articulation of that intent." *TranSched Sys. Ltd. v Versyss Transit Sols., LLC*, 2012 WL 1415466 (Del. Super. Ct. Mar. 29 2012); see also *Deere & Co. v Exelon Generation Acquisitions, LLC*, 2016 WL 6879525 (Del. Super. Ct. Nov. 22, 2016) ("Delaware typically follows the

² Thus, the cases cited by defendants applying the Delaware General Corporation Law are all distinguishable and need not be addressed individually.

'American Rule' [that] litigants generally are responsible for their own litigations costs. ...

In order for an indemnification provision to cover fee-shifting among parties, the contract must specifically state that requirement"). Thus, the Court must look to the parties contract in this case.

The document controlling the disposition of this motion is entitled "Bridgeport Phase I Manager LLC Amended and Restated Limited Liability Company Operating Agreement" dated as of June 30, 2005 (Exh 1 to Hayes Affirmation in Support of OSC) (the "Manager's Operating Agreement" or the "Agreement"). The relevant provision § 11.3, included in Article XI Indemnification, reads in its entirety as follows:

Advance Payment of Expenses. The rights to indemnification conferred in this Article XI shall include the right to be paid by the Company [plaintiff Bridgeport Phase I Manager LLC] the expenses incurred in defending any Proceeding in advance of its final disposition (an "Advancement of Expenses") provided that the Indemnitee first executes an agreement with the Company obligating the Indemnitee to repay any Advancement of Expenses if it is ultimately determined that such Indemnitee was not entitled thereto.

Definitions of the terms "Proceeding" and "Indemnitee" are included in § 11.1(a) of that same Article, which reads in relevant part as follows:

The Company shall, to the fullest extent authorized or permitted by the [Delaware Revised Uniform Limited Liability Company] Act ... indemnify and hold harmless each Member and any Representative of a Member ... (any such Member or Representative being referred to herein as an "Indemnitee"), against any and all expenses, liability and fees (including attorneys' fees, judgments, fines, excise or other taxes or penalties) in connection with any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative, arbitative, or investigative, any appeal in such action, suit or proceeding, and any inquiry or investigation that could lead to such an action, suit or proceeding (hereinafter a "Proceeding"), by reason of the fact that such person was or is a Member or Representative thereof (including in circumstances ... where such person is, was, or is threatened to be made a defendant or respondent in any such suit or proceeding).

The Court finds that the cited provisions do not clearly and unequivocally entitle defendants to an Advancement of Expenses in the form of indemnification of attorney's fees incurred defending this action. As most indemnification provisions apply to third-party suits and § 11.3 makes no explicit mention of party versus party suits, the Court declines to find as a matter of law that the cited provision creates an exception to the general rules discussed above.

In so holding, the Court is mindful of plaintiffs' assertion that defendants' interpretation of § 11.3 would render meaningless three other provisions in the Indemnification Article, a result prohibited by law. See *Sonitrol Holding Co. v Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992). Specifically, plaintiffs claim, the notice provisions in §11.2(b) make "no sense" in the context of first-party claims; the determination of relative fault in §11.6 necessarily applies to third-party claims against the Company and Indemnitee jointly; and the procedure in §11.4 directing that the Indemnitee "bring suit against the Company" to recover the expenses contemplates that no action between the parties exists and that the fees were incurred in connection with a third-party claim. Although the Court is not embracing this interpretation of these provisions in the Agreement, the issues created by the interrelationship of the various clauses is sufficient to raise questions about the proper interpretation of the Advancement of Expenses clause relied upon by defendants in their request for relief.

Defendants' reliance in its May 2, 2017 letter on a recent decision of the Delaware Supreme Court does not compel a contrary result. The relevant fee provision in *Trascent Mgmt. Consulting, LLC v Bouri*, No. 126, 2016 (Del. Nov. 28, 2016), is not identical to the provision here. What is more, the court there was dealing with a

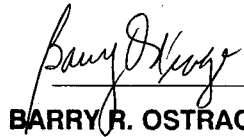
completely different issue; that is, whether a party could avoid the enforcement of an advancement of fees clause by claiming that the contract was unenforceable due to fraud in the inducement.

In sum, issues exist warranting the denial of defendants' motion at this time.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment finding that defendant are entitled to Advancement of Expenses pursuant to §11.3 of the Manger's Operating Agreement is denied without prejudice to renewal after a fuller record has been developed. Discovery shall proceed expeditiously in accordance with the Consent Order dated May 2, 2017 (NYSCEF Doc. No. 113), and the parties shall return for a discovery compliance conference on July 18, 2017 at 9:30 a.m.

Dated: May 9, 2017



BARRY R. OSTRAGER
JSC