

**David Peyser Sportswear, Inc. v Computer  
Generated Solutions, Inc.**

2018 NY Slip Op 30048(U)

January 9, 2018

Supreme Court, New York County

Docket Number: 651547/2017

Judge: Barry Ostrager

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 61

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DAVID PEYSER SPORTSWEAR, INC.

Plaintiff,

- v -

COMPUTER GENERATED SOLUTIONS, INC.,

Defendant.

INDEX NO. 651547/2017

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 003

**DECISION AND ORDER**

**BARRY R. OSTRAGER**  
JSC

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The following e-filed documents, listed by NYSCEF document number 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this application to/for Summary Judgment

HON. BARRY R. OSTRAGER:

**Background**

Plaintiff David Peyser Sportswear, Inc. (“Peyser”) is a manufacturer and supplier of high-end sportswear. Defendant Computer Generated Solutions, Inc. (“CGS”) is an IT company that sells, *inter alia*, licenses to software. One such software product, BlueCherry, is an Enterprise Resource Planning program that assists companies in planning and managing supply chains, sales, distribution, and related business activities. This dispute concerns the scope of an indemnity provision in a contract between Peyser and CGS.

Non-party Delta Apparel, Inc. (“Delta”), another clothing manufacturer, obtained a license to use BlueCherry from CGS in a generic, blank form. In order to effectively utilize the BlueCherry software, Delta made a comprehensive data compilation, customization, and

configuration of the BlueCherry software licensed to Delta. At issue in this case is the customized CGS software Delta utilized for Delta's "The Game" apparel line.

In 2014, Delta and Peyser engaged in discussions regarding the sale of Delta's "The Game" apparel line and Peyser ultimately purchased Delta's "The Game" apparel line. The various assets in Delta's "The Game" apparel line were individually valued for consideration by Peyser. The BlueCherry software was one such asset, which Delta valued at approximately \$1,000,000, and was allegedly excluded from Delta's sale of "The Game" to Peyser, according to a complaint Delta later filed against Peyser in the United States District Court for the Middle District of Alabama (the "Alabama Action"). Again, according to Delta's Alabama complaint, prior to closing on the sale of "The Game", Peyser requested that Delta allow Peyser to utilize Delta's customized BlueCherry software for a limited transition period during which time Peyser would decide whether to purchase the customized software. It is alleged in the Alabama Action that Delta agreed to permit Peyser to use the BlueCherry software, without cost, for a period of six months. Peyser allegedly represented that it would discontinue use of the software after the six-month period absent a purchase or an extension.

Delta initiated the Alabama Action against Peyser after Peyser allegedly failed to discontinue use of the BlueCherry software following the six-month period. Delta sued, claiming, *inter alia*, willful copyright infringement. Delta and Peyser eventually settled the Alabama Action.

In 2015, Peyser entered into a Software License Agreement ("SLA") directly with CGS for the BlueCherry software. Importantly, the SLA did not include the comprehensive data compilation, customization, and configuration by Delta, which Delta—not CGS—created and developed following Delta's purchase of the BlueCherry software from CGS in a generic, blank

form. The SLA contains indemnification provisions that provide that CGS will defend and indemnify Peyser for actions brought against Peyser

to the extent that such action is based on a claim that the CGS Software, used alone (*but not in connection with other programs, systems or software, unless the infringement is only related to the CGS Software component and not the combined software*) and within the scope of the License, infringes or copyright... or the trade secret rights [of the claimant]... (Cohen Aff. Ex. 2 [NYSCEF Doc. No. 36]) (emphasis added).

In 2017, Peyser initiated this action against CGS, the licensor of the BlueCherry software, claiming that CGS must defend and indemnify Peyser in the Alabama Action, pursuant to the above-stated indemnity provision. After a prior pre-answer motion to dismiss the complaint was granted in part, the surviving causes of action sound in breach of contract and economic duress. Plaintiff Peyser now moves for summary judgment on both of those claims.

### Legal Analysis

On a motion for summary judgment the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). “Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” *Id.* If this showing is made, the burden shifts to the party opposing the motion to produce admissible evidence sufficient to show the existence of a material issue of fact requiring a trial. *Id.* Further, in cases for breach of contract, “[w]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed.” *Hooper Assoc., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491 (1989).

An indemnification agreement is not an insurance policy pursuant to which the duty to defend is greater than the duty to indemnify. Here, the SLA does not unequivocally provide that

CGS must indemnify Peyser for Peyser's alleged failure to discontinue its use of Delta's customized version of the BlueCherry software. The indemnity provision clearly states that it does not apply to uses of the software "*in connection with other programs, systems or software*," unless the infringement is only related to the CGS Software component and not the combined software." (Cohen Aff. Ex. 2 [NYSCEF Doc. No. 36]) (emphasis added). On its face, it appears that Delta's claims against Peyser in the Alabama Action were predicated upon Peyser's allegedly unauthorized use of a highly customized version of the BlueCherry software—software that is arguably "in connection with other programs, systems, or software." It is, at the very least, a disputed issue of material fact as to whether the software at issue in the Alabama Action is sufficiently "in connection with other programs, systems, or software" such that the indemnity provision is applicable. In all events, on the basis of the allegations in the Alabama complaint, Peyser would arguably be seeking to compel CGS to indemnify Peyser for Peyser's own wrongdoing. Plaintiff's motion for summary judgment on its claim for breach of contract is therefore denied.

Plaintiff's economic duress claim, as conceded by plaintiff during oral argument on this motion, is necessarily derivative of plaintiff's breach of contract claim. Having denied summary judgment for breach of contract, the Court must likewise deny summary judgment on the economic duress claim.


Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied.

ORDERED that the parties are to appear for a status conference on January 30, 2018 at 9:30 a.m.

1/9/2018

DATE

  
BARRY R. OSTRAGER  
JSC

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: