SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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BETA HOLDINGS, INC., BETA INTERNATIONAL, INC., BETA HOLDINGS HOLDCO, LLC, BETA ACQUISITION I CO., INC., and BETA ACQUISITION II CO., INC.,

Plaintiffs,

-against- Index No. 652401/12

ROBERT J. GOLDSMITH and RAFAEL RAMOS,

Defendants.

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ANDREA MASLEY, J.

Plaintiffs Beta Holdings, Inc. (BHI), Beta International, Inc. (BI), Beta Holdings Holdco, LLC (Holdco), Beta Acquisition I Co., Inc. (Beta I), and Beta Acquisition II Co., Inc. (Beta II) move, pursuant to CPLR 2221 (e) for leave to renew, with regard to this court's November 3, 2017 order (11/3/17 Order), confirming, in part, the August 23, 2017 report of Special Referee Jeffrey A. Helewitz. Defendants Robert J. Goldsmith and Rafael Ramos cross-move, pursuant to CPLR 3212, for partial summary judgment granting recovery on certain Series A Notes issued to them by Beta II, and directing the release to them of certain funds currently held in a Wells Fargo, N.A. escrow account.

A motion to renew must be based upon "new facts not offered on the prior motion that would change the prior determination" and must "contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e]). The 11/3/17 Order, which confirmed the Referee's report, to the extent of ordering reimbursement for the payment of certain tax liabilities incurred by BHI, specified that the reimbursement be made to BHI and BI, the entities that made the payments. Plaintiffs contend that, pursuant to the "Stock Purchase Agreement" (SPA), entered into by Holdco, Beta I, and Beta II, all of the plaintiffs should have

shared in the reimbursement, not just BHI and BI. The SPA is the "new fact." The SPA, and its provisions, have been a subject of litigation between the parties for five years. Rather than offering a truly new fact, plaintiffs are really objecting to defendants' argument, raised at the time of plaintiffs' motion to confirm the Referee's report, that the reimbursement should go to those corporate entities that actually made the tax payments. Plaintiffs were free to argue against defendants' position at that time and, in fact, did so at oral argument:

> "under the actual [SPA] . . . all of [the plaintiffs] – any of them had the right . . . to seek indemnification.
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> . . .
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> [T]he reason why the indemnification obligation ran to everybody was because it wasn't just one of these shell companies who actually paid the money. It was – ultimately came out of my client's [nonparty Corinthian Capital] pocket ultimately"

(Pearce affirmation, exhibit A, 10/31/17 oral argument transcript at 24-25). Moreover, in countering defendants' argument, that there was no documentary evidence that plaintiffs had made the payments for which they sought to be indemnified, plaintiffs submitted evidence showing that BHI and BI were the entities that made the payments. It is only on the basis of that evidence that defendants successfully argued that BHI and BI should be the entities indemnified. Thus, this is not a case like *Azzopardi v American Blower Corp.* (192 AD2d 453, 454 [1st Dept 1993]), which plaintiffs cite in support of their argument that defendants should not be permitted to make a new argument in their reply brief. Further, at oral argument, plaintiffs could have requested leave for all parties to submit additional briefs. They did not. A motion to renew is not the proper remedy when one believes that a court's decision is incorrect. (*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979].)

Plaintiffs' sole opposition to defendants' motion for summary judgment is that there is a

material issue of fact as to whether defendants misrepresented the value of BHI, the company that they sold to plaintiffs in exchange for the Series A notes and other compensation. The law of the case is that defendants made no material misrepresentations in connection with that sale (*see* Justice Oing's decision and order, dated December 22, 2014, NYSCEF Doc No. 271, affirmed by the Appellate Division, First Department [decision and order, dated June 16, 2015, NYSCEF Doc. No. 394]). Justice Oing also held that defendants are entitled to recover on the Series A notes, inasmuch as they received no payments for BHI, after the initial down payment [*see* decision and order, dated April 4, 2017, NYSCEF Doc. No. 468 at 6-7]). Accordingly, as the Series A notes are now due and owing, defendants are entitled to summary judgment on the notes, plus interest at the contractual rate of 9% (*see* Thompson affirmation [2/12/18], exhibits B and C at 1. Note No. A-1 is in the amount of $10,200,000 in favor of Robert J. Goldsmith. Note No. A-2 is in the amount of $1,800,000 in favor of Rafael Ramos).

Plaintiffs contend that defendants are not entitled to the funds in the escrow account, because that account was established for plaintiffs' benefit. Indeed, that account was established "to constitute a non-exclusive source of funds for the satisfaction of [certain] obligations of [defendants] under [the SPA]" (Pearce affirmation, exhibit E at 2). However, Justice Oing held that defendants are entitled to a judgment for the sums plaintiffs owe them, in excess of what defendants may owe to plaintiffs (*see* Justice Oing's order, April 4, 2017, at 9). While that part of the order specifically addressed defendants' claims for attorney's fees, it was not limited to those claims. In any event, as plaintiffs acknowledge, the bar on set offs, that is included in the Series A notes, prohibits defendants "from demanding that amounts they owe to Plaintiffs be reduced by any amounts owed by Plaintiffs under the notes" (plaintiffs' reply memorandum of

law at 12). However, it does not bar defendants from collecting from plaintiffs the sums defendants are owed that exceed any amounts as defendants owe them. The 11/3/17 Order holds that, before any consideration of the Series A notes, plaintiffs are entitled to approximately $2.228 million, plus interest, of which sum, Holdings is due $2,044,409.27, plus interest, and BI is due $183,565.32, plus interest. The 11/3/17 Order also provides that Beta II owes defendants $1.197 million, plus interest, on the Series B notes, and $481,000 on the Series C notes, and that Beta I owes defendants $3 million on a secured note that is guaranteed by BI. Thus, even before consideration of the Series A notes, defendants are due far more from plaintiffs than plaintiffs are due from defendants. Beta II, the issuer of the Series A notes and the entity that is a party to the escrow agreement, already owes defendants $1,658,000, plus interest, on the Series B and C notes, pursuant to the 11/3/17 Order, and now owes them an additional $12 million, plus interest, on the Series A notes. Even if, contrary to the 11/3/17 Order, all plaintiffs were to share in the tax indemnification, and leaving aside the $1.35 million in stipulated attorneys' fees that defendants are due, Beta II owes defendants more than $10 million more than defendants could owe Beta II.

At the oral argument on plaintiffs' motion to confirm the Special Referee's report, counsel for plaintiffs acknowledged that the five plaintiff entities are all shells with no assets. Accordingly, the amount of approximately $1,000,000, that is in the escrow account, is the only fund available to Beta II, for payment of a part of its debt to defendants. Accordingly, and, pursuant to the court's inherent power to set off one judgment against another (*see Joseph Kali Corp. v A. Goldner, Inc.*, 49 AD3d 397, 398 [1st Dept 2008]; *Scianna v Scianna,* 205 AD2d 750, 750 [2d Dept 1994]) the court is directing Beta II to pay that sum to the defendants.

Accordingly, it is hereby

ORDERED that the motion of plaintiffs Beta Holdings, Inc., Beta International, Inc., Beta Holdings Holdco, LLC, Beta Acquisition I Co., Inc., and Beta Acquisition II Co., Inc. for leave to renew, in regard to this court's order, dated November 3, 2017, is denied; and it is further

ORDERED that the motion of defendants Robert J. Goldsmith and Rafael Ramos for summary judgment is granted and the Clerk of the Court is directed to enter judgment: (a) in favor of defendant Robert J. Goldsmith and against plaintiff Beta Acquisition II Co., Inc. in the amount of $10,200,000, together with interest at the rate of 9% per annum from the date of December 11, 2016, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate; and (b) in favor of Rafael Ramos and against plaintiff Beta Acquisition II Co,. Inc. in the amount of $1,800,000, together with interest at the rate of 9% per annum from the date of December 11, 2016, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate: and it is further

ORDERED that plaintiff Beta Acquisition II Co., Inc. is directed to withdraw the funds currently on deposit in Wells Fargo Bank, N. A, pursuant to the escrow agreement between Beta Acquisition II Co., Inc. and the defendants, and to turn the funds over to the defendants in proportion to the defendants' interests in the Series A notes that Beta Acquisition II Co., Inc issued to defendants.

Dated: 10/3/18

ENTER:

J.S.C.
HON. ANDREA MASLEY