

**Unique Logistics Intl. (NYC) LLC v PEM-Am., Inc.**

2019 NY Slip Op 32806(U)

September 19, 2019

Supreme Court, New York County

Docket Number: 652583/2018

Judge: Louis L. Lock

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

-----X

UNIQUE LOGISTICS INTERNATIONAL (NYC) LLC

Plaintiff,

- v -

PEM-AMERICA, INC.,

Defendant.

-----X

INDEX NO. 652583/2018

MOTION DATE 03/14/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42 were read on this motion to/for JUDGMENT - DECLARATORY

Upon the foregoing documents, the motion of Plaintiff Unique Logistics International (NYC) LLC ("Plaintiff" or "Unique") for summary judgment is denied, and the cross-motion of defendant PEM-America, Inc. ("Defendant" or "PEM") to dismiss and/or for summary judgment is denied, in accord with the following memorandum.

Background

In this action, Plaintiff seeks to enforce a purported promise by Defendant to indemnify Plaintiff, as set forth in a letter dated October 31, 2017 (the "Letter of Indemnity") (Ray 11/7/2018 Aff., Ex. A). Sometime prior to September 2017, Defendant engaged Plaintiff to provide freight forwarding services in connection with the delivery of a shipment of goods (the "Shipment") manufactured by non-party Valiant Glass Works Pvt. Ltd. ("Valiant"). The Shipment was sent from India to the United States under Bill of Lading No. BOM/OE-S/01483 (PO #36795) (the "Bill of Lading") (Ross 11/7/2018 Aff. Exs. 18-19) and arrived in the United States on September 15, 2017. On September 25, 2017, Plaintiff released the Shipment to

Defendant without first collecting the Bill of Lading. The parties offer conflicting accounts of the events surrounding the release of the Shipment, but both concede that Plaintiff was not required to do so until it was presented with the original Bill of Lading.

On October 31, 2017, non-party Chuck Brannon (“Brannon”), Chief Operating Officer of Defendant, executed and provided the Letter of Indemnity to Plaintiff. The letter bears a heading that identifies it as a “LETTER OF INDEMNITY” and indicates that “This Letter of Indemnity pertains to BL No. BOM/OE-S/01483, (PO# 36795) with a total FOB Value of US \$90,865.62.” In the body of the letter, Brannon acknowledges that the goods were released without the original Bill of Lading and states that “[Defendant] agrees to indemnify [Plaintiff] and your agents and affiliates from all claims, liabilities, demands, actions, costs and consequences that might be brought forward by [Valiant]. We will reimburse in full any losses, damages, interest, legal costs and other expenses you may face in this matter” (Ray 11/7/18 Aff., Ex. A). Defendant admits that it provided the Letter of Indemnity to Plaintiff, but alleges that it did so under economic duress because Plaintiff “wrongfully held as hostage, other goods that it had shipped on behalf of PEM, and which PEM had paid in full for, unless and until PEM agreed to indemnify [Plaintiff]” (Brannon 11/26/2018 Aff. ¶ 14). Upon learning that Plaintiff had released the shipment to Defendant without first securing the Bill of Lading, Valiant demanded payment of \$90,865.62 from Plaintiff (Ray 11/7/19 Aff. ¶ 13). Plaintiff makes no representation that it has made any payment to Valiant in response to its demand. A criminal investigation or proceeding was also commenced against Unique Logistics International (India) Pvt. Ltd. (“Unique India”), Plaintiff’s affiliate in India (Ray 11/7/19 Aff. Ex. B; Kaplan Aff. Ex. 4), the nature and status of which are unclear in the evidence before the court.

On May 23, 2018, Plaintiff commenced this proceeding, seeking to enforce the Letter of Indemnity by asserting claims for declaratory judgment, indemnification, and breach of contract against Defendant. Defendant appeared in the action on June 19, 2018 by filing an answer, which interposes six affirmative defenses. Plaintiff now moves for summary judgment, seeking an order declaring that Defendant shall indemnify Plaintiff and Unique India in connection with Valiant's demand for payment, granting Plaintiff a judgment against Defendant in the amount of \$90,865.62, and for the award of costs, fees and expenses, and attorneys' fees incurred in connection with the events that are at issue in this proceeding. Defendant opposes and cross-moves to dismiss the action pursuant to CPLR 3211(a)(7) or for summary judgment in its favor.

#### Discussion

Plaintiff moves for summary judgment on the basis of the plain language of the Letter of Indemnity, Valiant's demand for payment, and the proceeding in India (Ross 11/7/18 Aff. ¶ 18). The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact'" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Regardless of the sufficiency of the opposing papers, in the absence of admissible evidence sufficient to preclude any material issue of fact, summary judgment is unavailable" (*Aetna Cas. & Sur. Co. v*

*Island Transp. Corp.*, 233 AD2d 157, 157 [1st Dept 1996]). In considering a summary judgment motion, evidence should be “viewed in the light most favorable to the opponent of the motion” (*People v Grasso*, 50 AD3d at 544 [internal citation omitted]).

Generally, a party is “entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances” (*Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82, 87 [1st Dept 2018]). Here, the promise to indemnify is set forth in a letter that is not part of a broader contractual agreement. The court must, therefore, draw its conclusions from only the plain language of the Letter of Indemnity and the surrounding facts and circumstances, which are heavily disputed by both parties. The plain language of the Letter of Indemnity indicates Defendant’s intention to indemnify Plaintiff for “claims, liabilities, demands, actions, costs and consequences” brought by Valiant in connection with the Shipment and the Bill of Lading. The inclusion of “demands,” “actions,” “costs and consequences,” and the absence of limiting or conditional language regarding the circumstances triggering indemnification, indicates that the broad agreement to indemnify was intended to include *all* circumstances where Plaintiff incurred costs to Valiant related to the Shipment or Bill of Lading and was not limited to a judgment or finding of liability against Plaintiff, as Defendant asserts. The inclusion of nascent circumstances, in particular, “demands” and “actions,” implies that a mere demand for payment or initiation of an action against Plaintiff would trigger the promise to indemnify.

Nevertheless, the broad language of this promise to indemnify is then contradicted by Defendant’s representation that it “will reimburse in full any losses, damages, interest, legal costs and other expenses [Plaintiff] may face in this matter” (emphasis added). This suggests that

Plaintiff's recovery may be limited to the reimbursement of amounts already paid in connection with "claims, liabilities, demands, actions, costs and consequences" that may be brought by Valiant, not the upfront payment of claims that Plaintiff seeks. Whereas Plaintiff has not paid Valiant's demand, none of the terms set forth in the Letter of Indemnity are defined, and neither party has submitted information regarding the intent of the parties with respect to the scope of the promise to indemnify and under what circumstances Plaintiff may recover from Defendant, questions of fact exist regarding this issue.

Further complicating matters, Defendant cross-moves to dismiss the complaint for failure to state a cause of action or for summary judgment in its favor, arguing that (i) the action is premature because Plaintiff has neither paid any underlying claim, nor has there been a finding of liability against Plaintiff, and (ii) the Letter of Indemnity is unenforceable because it lacks consideration and was obtained under economic duress. When reviewing a motion to dismiss a complaint for failure to state a cause of action, "a court must give the complaint a liberal construction, accept the allegations as true and provide plaintiffs with the benefit of every favorable inference" (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]). "Whether plaintiff can ultimately prove its allegations is not a consideration in determining a motion to dismiss" (*id.* at 47). If Plaintiff is "entitled to a recovery upon any reasonable view of the stated facts, the complaint is legally sufficient and the motion must be denied" (*Hoag v Chancellor, Inc.*, 246 AD2d 224, 228 [1st Dept. 1998]). "The sole criterion [on a motion to dismiss] is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail" (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]).

At the outset, the cases cited by Plaintiff to support its assertion that this action is premature are inapposite because they address parties seeking equitable indemnification or insurance coverage, not contractual indemnification. As with all contractual agreements, words in a contract to indemnify “are to be construed to achieve the apparent purpose of the parties” (*Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 492 [1989]). As discussed *supra* at 4-5, the plain language of the Letter of Indemnity includes a broad promise to indemnify in circumstances that would not require a judgment or finding of liability against Plaintiff. Furthermore, where a party seeking contractual indemnification has not paid the underlying claim and a judgment has not been entered against it, a court may render conditional summary judgment on the issue of indemnity because it “serves the interest of justice and judicial economy in affording the indemnitee the earliest possible determination as to the extent to which [it] may expect to be reimbursed” (*Hong-Bao Ren v Gioia St. Marks, LLC*, 163 AD3d 494, 496 [1st Dept 2018][internal quotation marks omitted]). Therefore, the action is not premature.

Turning to the questions of consideration and economic duress, issues of fact exist with respect to these allegations. The evidence presented to the court regarding consideration and economic duress consists of competing party affidavits and emails between the parties that contain contradictory information, reveal gaps in time between the parties’ written correspondence, refer to discussions that are not reflected in the record before this court, and do not include conclusive evidence regarding when the initial promise to indemnify was made, what consideration was exchanged for the promise, and whether Defendant was compelled to provide the Letter of Indemnity under economic duress. Because it is possible to draw competing inferences based on the evidence before the court, questions of material fact exist regarding these issues.

Accordingly, it is  
 ORDERED that plaintiff's motion for summary judgment is denied; and it is further  
 ORDERED that defendant's cross-motion to dismiss and/or for summary judgment is  
 denied; and it is further  
 ORDERED that a preliminary conference for this matter will be held on October 10,  
 2019 at 2:15 p.m., at 111 Centre Street, Part 38 – Room 1166, New York, New York 10013.

9/19/2019  
 DATE

*Louis L. Nock*  
 LOUIS L. NOCK, J.S.C.

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  SUBMIT ORDER  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  FIDUCIARY APPOINTMENT

INCLUDES TRANSFER/REASSIGN  REFERENCE