

**London Capital Holdings Ltd. v Griffen Holdings
Servs. Ltd.**

2021 NY Slip Op 30706(U)

March 1, 2021

Supreme Court, New York County

Docket Number: 656346/2017

Judge: Barry Ostrager

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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. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

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LONDON CAPITAL HOLDINGS LTD., SUBACU INVESTMENT PARTNERS, LP and PCH, LTD.,

Plaintiffs,

- v -

GRIFFEN HOLDINGS SERVICES LIMITED,

Defendant.

-----X

HON. BARRY R. OSTRAGER

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DECISION + ORDER ON MOTION

Pending before the Court are cross-motions for summary judgment on claims and counterclaims in this trial ready 2017 case that was transferred with the pending motions from Justice Saliann Scarpulla to this Court. For the reasons set forth below, both motions are denied.

This case arises out of the purchase by the defendant Griffen Holdings Services Limited ("Griffen") from plaintiffs London Capital Holdings Ltd., Subacu Investment Partners, LP and PCH, Ltd., (collectively, "Plaintiffs") of a property located at 10 East 63rd Street in Manhattan ("the Property"). Pursuant to a February 2016 Stock Purchase Agreement ("SPA") between Plaintiffs and Griffen (NYSCEF Doc. No. 81), Griffen purchased all the outstanding shares of stock in Subacu Holdings, Ltd. ("SHL") and all the shares Plaintiffs owned in Guam Investment Services Limited ("Guam") except one share. SHL and Guam, in turn, owned all the shares in 10 East 63rd Street, Inc., a New York corporation that was the fee owner of the Property. SHL, Guam, and the defendant are all British Virgin Island ("BVI") companies.

A closing took place on or about March 17, 2016, and pursuant to the SPA, the parties executed an Escrow Agreement into which \$750,000.00 of the \$14,228,500.00 purchase price was deposited (NYSCEF Doc. No. 82). After the closing, Griffen purchased the one share of Guam that Plaintiffs did not own and Griffen became the 100% owner of the Property at 10 East 63rd Street.

Section 4.10 of the SPA contained a recital that neither Guam, SHL, nor the Property Owner had any liabilities other than those disclosed in the Schedule to Section 4.10 of the SPA. Section 4.10 did not disclose that Guam owed \$2,789,049.60 to an affiliate. However, pursuant to other provisions of the SPA, Plaintiffs provided Griffen with the balance sheets and profit and loss statements for both Guam and SHL.

The crux of this dispute is Griffen's claim that Plaintiffs breached an express warranty in the SPA and Plaintiffs' claim that Griffen in the exercise of due diligence could have assessed the significance of any liability--which, in all events, arguably could have been extinguished because Griffen owned all the shares of Guam and SHL. Plaintiffs assert that Griffen's reliance on the holding in the landmark case of *CBS Inc. v. Ziff-Davis Publ. Co.*, 75 N.Y.2d 496 (1990), with respect to express warranties, does not preclude granting Plaintiffs summary judgment on the breach of the SPA claim. In the latter connection, Plaintiffs rely on the oft-cited case of *Galli v. Metz*, 973 F.2d (2d Cir. 1992), which many courts have held creates an exception to the *Ziff-Davis* rule that express warranties are enforceable by their terms in circumstances in which the seller discloses all relevant information covered by the warranty.

The cross-motions for summary judgment on Count One of the Amended Complaint (NYSCEF Doc. No. 26) and Griffen's corresponding counterclaim (NYSCEF Doc. No. 55) must be denied because the tax consequence of sales by a BVI entity of property in the United States

is presently unknown and Guam may have a contingent tax liability which, at least theoretically, may be taxed against the escrow fund.

Plaintiffs devoted many pages of the summary judgment briefing to the argument that Griffen's cross-motion for summary judgment is untimely. The argument is moot because the Court is denying Griffen's cross-motion for summary judgment. But, on that point, suffice it to say that filing deadlines in the late winter and early spring of 2020 during the height of this Court's limitations on non-essential filings due to the pandemic must be liberally construed.

The balance of the cross-motions relate to the counts of the Amended Complaint and the corresponding counterclaims and affirmative defenses that involve claims arising out of post-closing, contested tax assessments asserted by New York City on the 10 East 63rd Street Property. By the terms of the SPA, Plaintiffs are responsible for sales taxes. Plaintiffs assert the additional tax assessments were generated because of mortgages with which Griffen encumbered the property; Griffen's counter-argument is that the taxes are unrelated to the mortgages, are the responsibility of the Plaintiffs, and, in all events, the taxes have not been paid and are being contested. The cross-motions for summary judgment on the remaining claims and counterclaims are therefore denied, as the claims involve disputed issues of fact.

In sum, if this dispute cannot be consensually resolved through mediation, a bench trial will have to be conducted at which expert and fact witness testimony will have to be adduced. A pre-trial conference is scheduled for April 2, 2021 at 11:00 a.m. to fix a trial date. The appearance will be conducted with a court reporter via Microsoft Teams. On or before March 15, 2021 the parties must efile a letter with a Joint Appearance Sheet. The Joint Appearance Sheet shall contain the full caption and index number of the case, the name of each attorney who will be participating in the Microsoft Teams appearance, that attorney's law firm, law firm address, telephone number, email address for each individual appearing attorney, and the client represented.

For all the foregoing reasons, it is hereby

ORDERED that the cross-motions for summary judgment are denied, and the parties shall proceed to trial on a date to be scheduled at the April 2, 2021 pre-trial conference at 11:00 a.m. unless the disputed issues are consensually resolved.

Dated: March 1, 2021

Barry R. Ostrager

BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: