SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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NEEDHAM & COMPANY, LLC,

Plaintiff,

- v -

UPHEALTH HOLDINGS, INC., UPHEALTH SERVICES, INC.

Defendant.

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INDEX NO. 655331/2021

MOTION DATE 12/17/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for DISMISSAL.

This action arises from defendants' alleged failure to pay plaintiff a transaction fee for its services. Defendants UpHealth Services, Inc. and UpHealth Holdings, Inc. move pursuant to CPLR 3211(a)(1) for an order dismissing plaintiff Needham & Company, LLC's second cause of action for indemnification and reimbursement of legal fees. Plaintiff opposes the motion. Defendants' motion is granted for the reasons below.

Background

Plaintiff Needham & Company, LLC (Needham or plaintiff) is an investment bank specializing in advisory and financing services. Defendant UpHealth Services, Inc. (Services or defendant), is a healthcare industry business. Plaintiff and defendant entered into a letter agreement (the Engagement Agreement) on March 15, 2020, which was subsequently amended on July 22, 2020 (NYSCEF # 2, Complaint, ¶ 16; NYSCEF # 10, the Engagement Agreement). Under the Engagement Agreement, Services retained plaintiff as its "exclusive financial advisor" for defendant's acquisition of "Target Companies" engaged in digital medicine (NYSCEF # 2, ¶ 1). The Engagement Agreement provided for plaintiff's duties as defendant's exclusive Placement Agent and the terms of compensations among other duties and obligations of both parties (NYSCEF # 10).

The provisions relevant to this motion to dismiss the second cause of action are the sections for reimbursement and indemnification in the Engagement Agreement (NYSCEF # 2, ¶¶ 72-76). Section 4 of the Engagement Agreement

dictates the terms for reimbursements by defendant to plaintiff. Specifically, defendant is to reimburse plaintiff "for all of its out-of-pocket expenses incurred in connection with this engagement, including the fees and disbursements of its legal counsel" (NYSCEF # 10, § 4). In addition, a two-page addendum under Addendum A sets forth in detail plaintiff's rights to indemnification as follows:

> [Services] agrees to indemnify and hold harmless [Needham] from and against any and all losses, claims, damages, expenses (including reasonable fees and disbursements of counsel) and liabilities (or actions or proceedings in respect thereof) (collectively, "Losses") caused by, relating to, based upon or arising out of (i) [Needham's] engagement under the Agreement, any transaction contemplated by such engagement or any [Needham's] role in connection therewith ... or (ii) any untrue statement or alleged untrue statement of a material fact contained in any offering materials ...; provided, however, that with respect to clause (i) above, such indemnification obligation shall not apply to any such Loss to the extent it is found in a final judgment by a court of competent jurisdiction (not subject to further appeal) to have resulted primarily and directly from the gross negligence or willful misconduct of [Needham].

(*id.* at 10).

Defendants argue that the Engagement Agreement provides for indemnification and attorney's fees only in third-party claims but not intra-party disputes like those at issue here (NYSCEF # 15). Defendants point out that under long-standing New York law, reimbursement of attorney's fees is not available in actions between the contracting parties except when the contract clearly provides for it, which exception is not found in this Engagement Agreement (*id.*).

Plaintiff counters that the indemnification provision covers both third-party claims and intra-party claims because the language of the provision at issue is extremely broad and contains a disclaimer of liability, which refers to intra-party disputes (NYSCEF # 22). Defendants respond that indemnification provisions like the one at issue have been repeatedly found insufficient to cover intra-party disputes, and that the indemnification provision's notice and consent requirements further support this finding (NYSCEF # 28).

Discussion

A motion to dismiss pursuant to CPLR 3211(a)(1) may be appropriately granted "only if the documentary evidence submitted conclusively establish a defense to the asserted claims as a matter of law" (*Morgenthow & Latham v Bank*

of New York Company, Inc., 305 AD2d 74, 78 [1st Dept 2003] [internal citations and quotations omitted]). Under these circumstances, "legal conclusions and factual allegations [in the complaint] are flatly contradicted by documentary evidence [such that] they are not presumed to be true or accorded every favorable inference" (*id.* [internal citation and quotation omitted]). While CPLR 3211(a)(1) does not explicitly define "documentary evidence," typically a document will qualify as "documentary evidence" if it is unambiguous, authentic, and its contents are essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]). New York courts have found that contracts can provide a proper basis for a CPLR 3211(a)(1) motion as "documentary evidence" (*see e.g. Gottesman Co. v A.E.W, Inc.*, 190 AD3d 522, 524 [1st Dept 2021] [finding that transaction documents and undisputed emails constitute "documentary evidence"]; *Hart 230, Inc. v PennyMac Corp.*, 194 AD3d 789, 791 [2d Dept 2021] [holding that "documents reflecting out-of-court transactions such as mortgages, deeds, contracts" would qualify as documentary evidence]). Here, the Engagement Agreement is the type of "essentially undeniable" document that can form an appropriate basis for this motion pursuant to CPLR 3211(a)(1).

It is well-settled that the American Rule provides that attorney's fees are incidents of litigation and a prevailing party may not collect them from the losing party unless an award is authorized by an agreement between the parties, by statute, or by court rule (*Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]; *A.G. Ship Maint. Corp. v Lezak*, 69 NY2d 1, 5 [1986]). At the same time, it is not uncommon for contracts to contain indemnification provisions by which one contracting party holds the other harmless and agrees to reimburse attorney's fees incurred in connection with any indemnifiable claim (*see e.g. Ambac Assur. Corp v Countrywide Home Loans, Inc.*, 31 NY3d 569, 583 [2018]; *Hooper*, 74 NY2d at 490). However, the promise by one party to indemnify another for attorney's fees accrued in litigation between themselves is generally contrary to the American Rule, and a court should not infer a party's intention to waive the benefit of the rule unless the intention to do so "is unmistakably clear" from the language of the provision—a strict standard imposed by the Court of Appeals in *Hooper* (74 NY2d at 491-492; *see Gotham Partners, L.P. v High River Ltd. Partnership*, 76 AD3d 203, 207 [2010]).

Here, at issue is whether the indemnification provision in the Engagement Agreement evidences an unmistakably clear intent by defendants to reimburse plaintiff for its attorney's fees and costs in this action. Addendum A to the Engagement Agreement contains various provisions related to indemnification. Notably absent from any of the indemnification provisions upon which plaintiff rely is any reference to intra-party disputes. Given that absence, the contractual language is not unequivocally clear that the parties intended to reimburse plaintiff for its attorney's fees and expenses in the event of an action against defendant Services arising out of the agreement.

Plaintiff argues, however, that it is unmistakably clear that the parties intend to cover intra-party claims, because defendant chose to use highly inclusive language in the indemnification provision and did not limit the scope by listing types of indemnifiable claims (NYSCEF # 22 at 7-9, citing *Crossroads ABL v Canaras Capital Mgt., LLC*, 105 AD3d 645, 646 [1st Dept 2013] [finding that the indemnification provision covers intra-party claims because the parties used highly inclusive language and no other provision in the agreement would be rendered meaningless if the provision were read to include those claims]; *Sq. Mile Structured Debt (One), LLC v Swig*, 110 AD3d 449 [1st Dept 2013]).

Plaintiff's position is unavailing as courts have held that the contracting party's obligation to indemnify is not broadened by language such as "any and all" or "to the fullest extent permitted by law" (*Van Deventer v CS SCF Mgt. Ltd.*, 47 AD3d 503, 504 [2008]; *Community Counseling & Mediation Servs. v Chera*, 115 AD3d 589, 591 [1st Dept 2014]).[1] Moreover, unlike an extremely broad catch-all provision, the indemnification provision here refers to subjects that are susceptible to third-party claims, such as: "transaction contemplated by such engagement"; "any [of Needham's] role" in connection with the transaction; and "any untrue statement or alleged untrue statement of a material fact contained in any offering materials." This language limits those claims as referring to actions brought by or against third parties, such as investors of the proposed private placement or parties to the proposed transactions (*Ambac*, 31 NY3d at 583 [examining if the subjects set forth in the provisions are susceptible to third-party claims and finding none of the subjects unequivocally refers to intra-party claims]). Even if these subjects could arguably be interpreted to contemplate reimbursing attorney's fees for intra-party disputes in certain contexts, such an interpretation would be contrary to the standard established by *Hooper*, which presumes no reimbursement in intra-party claims unless the agreement provides for it in an unmistakably clear manner (74 NY2d at 491). Plaintiff also points to a disclaimer of liability clause as evidence of the parties' intent to reimburse fees in intra-party claims (NYSCEF # 22 at 9-10). But defendant Services' promise to disclaim plaintiff's liability has no bearing on the scope of claims intended for attorney's fees reimbursement.

Other provisions in Addendum A, which plaintiff did not cite, further indicate the parties' intention to permit reimbursement of attorney's fees only in third-party but not intra-party disputes, for example: plaintiff is required to give prompt notice to defendant of any action, suit, or proceeding that plaintiff seeks indemnification; defendant is to be held harmless for any settlement reached without defendant's written consent; and plaintiff is to employ separate counsel in the event plaintiff

[1] Although plaintiff also relies on another case that plaintiff had brought concerning a similar contractual provision (NYSCEF # 22 at 6, citing *Needham & Company, LLC v Qualstar Corp.*, Index No. 158916/2015 [Sup Ct, NY County 2015]), that decision denying the motion to dismiss a claim for attorney's fees does not conclusively address the issue here.

and defendant's interests differ (NYSCEF # 10 at 10). To extend the application of these indemnification provisions to intra-party claims "would render these provisions meaningless" since the requirement of notice, consent and the assumption of common counsel "ha[ve] no logical application to a suit between the parties" (*Hooper*, 74 NY2d at 492-493; *see also Beal Savings Bank v Sommer*, 8 NY3d 318, 324-325 [2007] [holding that a court should interpret a contract "so as to give full meaning and effect to material provisions" and so as not to "render any portion meaningless"]). Therefore, the Engagement Agreement provides for the recovery of attorney's fees only in third-party claims as evidenced by these indemnification provisions.

Accordingly, as the indemnification provisions of the Engagement Agreement do not permit the reimbursement of attorney's fees in intra-party disputes, the second cause of action seeking these fees must be dismissed.

Conclusion

In view of the above, it is

ORDERED that defendants' motion to dismiss the second cause of action is granted, and the second cause of action is dismissed; and it is further

ORDERED that a preliminary conference by Microsoft Teams (invite to be provided by the court) shall be held on March 30, 2022 at 3:00pm.

This constitutes the Decision and Order of the court.

2/28/2022
DATE

MARGARET CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	☐ DENIED		GRANTED IN PART	☐	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	☐	REFERENCE