Business Advance Team LLC v National Senior Ins., Inc.
2022 NY Slip Op 30985(U)
March 21, 2022
Supreme Court, Kings County
Docket Number: Index No. 518091/2021
Judge: Reginald A. Boddie
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At an IAS Commercial Term Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 21st day of March 2022.

P R E S E N T:
Honorable Reginald A. Boddie, JSC

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BUSINESS ADVANCE TEAM LLC D/B/A EVERYDAY CAPITAL,

Plaintiff,

Index No. 518091/2021
Cal. No. 3 MS 1

-against-

DECISION AND ORDER

NATIONAL SENIOR INSURANCE, INC. D/B/A SEEMAN HOLTZ D/B/A NATIONAL SENIOR INSURANCE INC, CENTURION INSURANCE SERVICE GR LLC D/B/A CENTURION INSURANCE SERVICES GROUP LLC, SEEMAN HOLTZ PROPERTY & CASUALTY, LLC D/B/A HEALTH CARE DIVISION, GOJI DIVISION, NATIONAL INSURANCE SOLUTIONS, KAERCHER CAMPBELL & ASSOC INS BROKERAGE, SCHWARZ INSURANCE AGENCY INC D/B/A SEEMAN HOLTZ PROPERTY & CASUALTY, RITMAN & ASSOCIATES, VINCENT URBAN WALKER AND ASSOCIATES INC D/B/A SEEMAN HOLTZ VUW, and MARSHAL SCOTT SEEMAN,

Defendants.

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Papers	Numbered
MS 1	Doc. # 13-25

Upon the foregoing cited papers, the decision and order on the motion to dismiss of defendants Seeman Holtz Property and Casualty, LLC, Schwarz Insurance Agency Inc., Vincent, Urban, Walker and Associates Inc., Ritman & Associates, National Insurance Solutions, Kaercher

Campbell & Assoc. Ins. Brokerage, and Goji Division (collectively, the Seeman Defendants), pursuant to CPLR 3211 (a) (7) (failure to state a claim) and CPLR 1001 (failure to join an indispensable party) is as follows:

Plaintiff commenced this action to recover monetary damages from defendants' alleged breach of the April 14, 2021 contract for the purchase of $4,107,000.00 worth of future receivables for $3,000,000.00 between plaintiff Business Advance Team LLC, D/B/A Everyday Capital (Everyday) and defendant National Senior Insurance, Inc. d/b/a Seeman Holtz d/b/a National Seniors Insurance Inc and the entities listed in attachment B of the agreement (National). Everyday alleged defendant Marshal Scott Seeman personally guaranteed payment on the agreement. Everyday alleged it performed pursuant to the agreement, defendants breached the agreement, and it is owed $3,441,000.00. The first cause of action alleged breach of contract against National. The second cause of action sought enforcement of personal guarantees against defendant Marshal. The third cause of action sought attorneys' fees pursuant to the parties' agreement.

Defendants Seeman Holtz Property and Casualty, LLC, Schwarz Insurance Agency Inc., Vincent, Urban, Walker and Associates Inc., Ritman & Associates, National Insurance Solutions, and Kaercher Campbell & Assoc. Ins. Brokerage, and Goji Division (the Seeman defendants) moved to dismiss on the first (breach of contract) and third (attorneys' fees) causes of action alleged against them in complaint for failure to state a cause of action and failure to join a necessary party. Movants argued the complaint fails as a matter of law because 1) it has failed to properly allege a breach of contract claim as to each Company Defendant; and 2) it has failed to join an indispensable party pursuant to CPLR 1001 (a), and 3) Seeman Holtz Property and Casualty, LLC was not a signatory to the agreement.

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the pleading must be afforded a liberal construction and the court must "accept the facts as alleged in the complaint as true, accord

plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Qureshi v Vital Transp., Inc.*, 173 AD3d 1076, 1077 [2d Dept 2019]). A motion to dismiss on the ground that the action is barred by documentary evidence pursuant to CPLR 3211 (a) (1) may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d at 326; *Leon v Martinez*, 84 NY2d at 88).

Movants' arguments for dismissal pursuant to CPLR 3211 (a) (7) are belied by the parties' contract. Moreover, there may be questions of fact regarding whether Seeman Holtz Property and Casualty, LLC (SHPC) and Seeman Holtz Property and Casualty are the same entity and whether adequate consideration was given. However, such questions do not warrant dismissal of the pleading at this stage in the litigation and may be further explored during discovery.

Defendants also argued for dismissal, pursuant to CPLR 3211 (a) (10) and CPLR 1001, on the ground plaintiff failed to join a necessary party. Defendants argued, "all of the Seeman Defendants' assets, including their accounts receivable, and their proceeds in various deposit accounts, are subject to the perfected first priority security interest of HSCM Bermuda Fund Ltd. [Bermuda Fund], SHPC's secured creditor." Defendant contended Everyday's security interest in defendants' assets, created by the subject agreement, is subordinate to those of other secured creditors, including Bermuda Fund, and therefore Bermuda Fund is a necessary party and failure to join it warrants dismissal. Plaintiffs opposed arguing a money judgment against the Seeman defendants in this action will have no effect on Bermuda Fund's interest in SHPC's assets.

"Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so he may be made a defendant" (CPLR 1001). When the issue is raised in a motion under CPLR 3211 (a) (10) to dismiss for nonjoinder, the court must first determine if the absentee is necessary within the meaning of CPLR 1001 (a). If the answer is no, the inquiry is at an end. If the answer is yes, the court proceeds to CPLR 1001 (b).

Defendants proffered the August 31, 2016 and October 15, 2018 UCC Financing Statements (NYSCEF 16, 17). The collateral identified in the August 31, 2016 statement included all accounts, accounts receivable, contract rights, instruments, promissory notes, insurance, tax refunds, license fees and other money of debtor on the date of filing or after-acquired. The October 15, 2018 statement identified the collateral as all assets owned as of the date of filing or after-acquired by debtor or to which debtor otherwise has rights and all proceeds thereof. Defendants argued, "Secured creditors are considered necessary parties if and when the resolution of the action 'will affect all competing claimants.' *Woori Am. Bank v. 885 E. 138th St., LLC*, 2008 N.Y. Misc. LEXIS 8707, at *3 (N.Y. Sup. July 25, 2008) (citing *Williams v. Somers*, 91 A.D.2d 545 (1st Dep't 1982))."

Plaintiff argued, "The Seeman Defendants, however, have failed to explain how a money judgment in this breach of contract action will affect HSCM's interest. Indeed, EDC is not seeking to repossess or judicially foreclose upon any collateral in which either EDC or HSCM hold a security interest; its claim is merely for monetary damages as a result of Sellers' breach of the Agreement. Thus, the single case that Plaintiff relies upon, *Woori Am. Bank v. 885 E. 138th St., LLC*, 2008 NY Slip Op 32087(U), ¶ 4 (Sup. Ct. N.Y. Cnty. 2008), is of no moment, as the plaintiff

in that action sought 'to recover certain equipment in which it ha[d] a security interest' but failed to name several parties which held similar interests in the equipment. *Id.*"

Plaintiff's assessment of Woori and Williams is correct. These cases concerned possessory interests in equipment, fixtures and property. In *Woori*, the plaintiff Woori Bank (Woori) held a perfected security interest in certain dry cleaning equipment and fixtures at the premises debtor Newtex leased to run its dry cleaning business. Newtex filed for bankruptcy and the landlord evicted Newtex and leased the premises to Carnegie. Carnegie was using the subject equipment and fixtures to run its dry cleaning business at the premises. During the bankruptcy proceedings, Woori and other creditors claimed security interests in the same equipment and fixtures. Woori commenced the action to recover these assets from Carnegie. In determining a motion to dismiss for failure to name necessary parties, the Court did not dismiss the complaint. Rather, the Court directed Woori to join those parties with competing security-interest claims on the ground that Woori was on notice before it commenced the action that others also laid claim to the same fixtures and equipment, and that their purported rights could be affected by the Court's determination. (*Woori Am. Bank v 885 East 138th St, LLC*, 2008 NY Slip Op 32087 [U] [Sup Ct New York County 2008]).

In *Williams*, a co-lessee of a building was not joined in a proceeding wherein plaintiffs were seeking a declaration of rights among the owner, the lessees, and sublessees. The Court held the co-lessee should be joined if complete relief is to be accorded to all the parties on the ground his rights [his interest in a building] may very well be inequitably affected by a judgment in the action (*Williams v Somers*, 91 AD2d 545, 545 [1st Dept 1982], citing CPLR 1001 [a]).

Here, plaintiff is not seeking a judgment which implicates the rights of any other party to fixtures, equipment or real property. Rather, plaintiff seeks a money judgment and therefore

defendant's argument for dismissal is unavailing. Accordingly, defendant's motion to dismiss is denied.

ENTER:

Honorable Reginald A. Boddie
Justice, Supreme Court

HON. REGINALD A. BODDIE
J.S.C.