Pacific W. Bank v 919 Old Winter Haven Realty, LLC
2022 NY Slip Op 31855(U)
June 9, 2022
Supreme Court, New York County
Docket Number: Index No. 652216/2020
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT:	**HON. LOUIS L. NOCK**	**PART**	**38M**
	Justice		

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PACIFIC WESTERN BANK, Plaintiff,	**INDEX NO.** 652216/2020
- v -	**MOTION DATE** 08/28/2020
919 OLD WINTER HAVEN REALTY, LLC, 2055 PALMETTO REALTY, LLC, 703 SOUTH 29TH ST REALTY, LLC, 1650 FOURAKER REALTY, LLC, 3663 15TH ST REALTY, LLC, ATLANTIC CARE ACQUISITION, LLC, WEST JACKSONVILLE CARE ACQUISITION, LLC, AUBURNDALE OAKS CARE ACQUISITION, LLC, LAUREL POINT CARE ACQUISITION, LLC, CLEAR WATER CARE ACQUISITION, LLC, and LEOPOLD FRIEDMAN, Defendants.	**MOTION SEQ. NO.** 001
	DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, and 44

were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is ordered that plaintiff's motion for summary judgment on liability for attorneys' fees and costs is granted, per the following memorandum.

Defendants operate nursing and rehabilitation facilities in Florida. In 2015, the previous owners of the facilities used loans from plaintiff Pacific Western Bank ("plaintiff" or "Pacific") to purchase and operate the facilities. The loan agreements required the previous owners to indemnify Pacific. In 2018, these owners sold the facilities to defendants. As part of the sale, defendants executed agreements assuming the loan agreements between plaintiff and the previous owners (the new loan agreements). As a condition precedent to the new loan agreements, defendant Leopold Friedman executed a personal guaranty for the benefit of Pacific.

Friedman, the sole individual defendant in this action, is a principal and the authorized manager of each of the other defendants.

In 2019, Pacific and the previous owners were named as defendants in nine Florida lawsuits. The plaintiffs in those lawsuits alleged that Pacific was liable under various theories in connection with the level of care provided by the previous owners to residents in their nursing homes. Pacific submits the complaint in one of the Florida cases (NYSCEF 31). It alleges that plaintiff aided and abetted the facilities' breach of fiduciary duty and that it engaged in civil conspiracy with the facilities to breach their fiduciary duty. As alleged, cash paid by Medicare, Medicaid, insurance companies, and nursing home residents was siphoned off by defendants for their personal benefit to the detriment of the well-being of the residents. According to defendants, all the Florida suits allege the same aiding and abetting and civil conspiracy claims against Pacific.

Pacific requested that defendants reimburse it for attorneys' fees and costs pursuant to indemnification provisions in the loan documents. For some months, defendants did so, but then stopped reimbursing Pacific in October 2019. Pacific states that, thus far, it has incurred over $400,000 in legal expenses. It has moved to dismiss each of the Florida actions. In the instant action, plaintiff sets forth three breach of contract causes of action seeking payment of legal fees and expenses. Plaintiff's claims are based on provisions in the loan documents with the title of "indemnity" and other provisions that do not use that rubric (*see, e.g.*, Complaint ¶¶ 19, 23, 24). The loan documents provide that they are governed by New York law.

Plaintiff argues that it is entitled to summary judgment on liability for legal expenses because defendants are contractually obligated to indemnify Pacific for the monies sought; defendants breached their contractual obligations; defendants have no defenses to the causes of action; and there are no genuine issues of material fact. Defendants argue that the motion is premature, as there has been no disclosure and plaintiff has failed to provide information relative to the underlying lawsuits for which it seeks indemnification. Defendants assert that without such information, there is no basis for seeking indemnification. Defendants state that plaintiff cannot be indemnified for the acts alleged in the Florida cases, as those are alleged as intentional acts. Defendants further contend that they have no obligation to indemnify plaintiff, as the aiding and abetting and civil conspiracy claims asserted against plaintiff do not arise out of the loan transactions. Defendants also assert that plaintiff breached the indemnification provisions by not seeking and obtaining their consent for its choice of counsel.

To obtain summary judgment, the movant must establish its cause of action "sufficiently to warrant the court as a matter of law in directing judgment" in its favor (CPLR 3212 [b]), and it must "set forth evidence that there is no factual issue" requiring an adjudication on the facts (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). To defeat a summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]). The parties do not dispute that plaintiff's ability to recover relief in the instant action rests on its rights under the terms of their agreements.

The loan agreements with the previous owners, which defendants assumed, contain the following indemnification provisions in relevant part:

> Each Borrower jointly and severally shall indemnify Agent and Lender . . . (collectively, the "**Indemnified Persons**") from and against any and all liabilities . . . of any kind or nature whatsoever (including reasonable fees and disbursements of counsel . . .) that may be imposed on, incurred by or asserted against any Indemnified Person with respect to or arising out of, or in any litigation, proceeding or investigation instituted or conducted by any Person with respect to any aspect of, or any transaction contemplated by or referred to in, or any matter related to, any Loan Document or any agreement, document or transaction contemplated by any Loan Document . . . .

(NYSCEF 3 ¶ 15.4.)[1]

The foregoing applies "whether or not such Indemnified Person is a party to such agreement, document or transaction, except to the extent that any of the foregoing results directly from the gross negligence or willful misconduct of such Indemnified Person as determined by a final non-appealable judgment . . . ." (*id.*).[2] "Indemnified Persons" are defined as the agent, the lender, their affiliates, and their respective employees, agents, and representatives (*id.*).

The guaranty by defendant Friedman guaranteed the payment and performance of defendants' obligations to plaintiff and provides the following indemnification promises:

> Guarantor shall indemnify Lender . . . from and against any and all liabilities, . . . judgments, suits, costs, expenses and disbursements of any kind or nature whatsoever (including, without limitation, in-house documentation and diligence fees and legal expenses and reasonable fees and disbursements of counsel) which may be imposed on, incurred by or asserted against Lender . . . with respect to or arising out of any aspect of, or in any litigation . . . with respect to . . . any of the Guaranteed Obligations or any of the Loan Documents . . . .

(NYSCEF 6 ¶ 24.)

Where parties have plainly expressed their intent in writing, the meaning of the writing is to be determined as a matter of law (*see, Chimart Assocs. v Paul*, 66 NY2d 570, 572 [1986]). "Clear and complete writings should generally be enforced according to their terms" (*Collins v E-Magine, LLC*, 291 AD2d 350 [1st Dept 2002]). Contractual advancement and indemnification rights are strictly construed, in order to avoid imposing on the parties any obligations to which they did not agree and did not intend to assume (*Comer v Krolick*, 2015 WL 775883, 2015 NY Slip Op 32274[U], *12 [Sup Ct NY County 2015], citing *Haynes v Kleinewefers & Lembo Corp.*, 921 F2d 453, 456 [2d Cir 1990]; *Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]). A party is entitled to be indemnified by another party pursuant to an

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[1] *See also*, NYSCEF 2 ¶ 15.4, containing nearly identical language.
[2] *See*, *id*.

agreement if the intent to indemnify is "clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (*Drzewinski v Atlantic Scaffold & Ladder Co., Inc.*, 70 NY2d 774, 777 [1987], *motion to amend dismissed* 70 NY2d 999 [1988]). Summary judgment on a contractual indemnification claim may be granted when the parties' agreement unambiguously and clearly reflects their intention that one party indemnify the other upon certain events (*Roddy v Nederlander Producing Co. of Am., Inc.*, 44 AD3d 556, 556 [1st Dept 2007]; *see, Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 433 [2005]).

The indemnification provisions in this case is "extremely broad, applying to 'any and all claims, demands, actions, suits or proceedings'" (*Crossroads ABL LLC v Canaras Capital Mgt., LLC*, 105 AD3d 645, 646 [1st Dept 2013]). The agreements use highly inclusive language in their indemnification provisions and do not list or limit the type of proceedings for which indemnification would be required (*id.*). Third party claims are not excluded. Additionally, the provisions in the loan documents indemnify plaintiff even if it is not a party to a dispute, an indication that third-party claims are included.

The claims against plaintiff are connected directly to its status as lender to the previous owners of the nursing home. The claims would not exist if not for the loans. Under the indemnification provisions, defendants must indemnify plaintiff in the Florida cases, unless the claims against plaintiff resulted from its gross negligence or willful misconduct. The exceptions align with the rule that indemnification agreements purporting to indemnify a party for damages flowing from its own intentional causation of injury are not enforceable (*Austro v Niagara Mohawk Power Corp*. 66 NY2d 674, 676 [1985]). Gross negligence is variously defined as "conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing" (*Colnaghi, U.S.A., Ltd. v Jewelers Protection Servs., Ltd.*, 81 NY2d 821, 823-824 [1993]).

Defendants have no duty to defend under the indemnification provisions if the allegations against plaintiff arise from gross negligence or willful misconduct. As defendants are not insurers, they do not bear the same obligation as insurers to defend the insured "whenever the allegations of the complaint suggest . . . a reasonable possibility of coverage" (*BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007] [internal quotation marks and citation omitted]). Defendants are non-insurers and their duty to defend, unlike the duty of an insurer, is not broader than their duty to indemnify (*Cuomo v 53rd & 2nd Assocs., LLC*, 111 AD3d 548, 548 [1st Dept 2013]). The duty of non-insurers to indemnify is strictly construed (*Viacom Inc. v Philips Electronics North America Corp.*, 16 AD3d 215, 215 [1st Dept 2005]), while the duty of an insurer is liberally construed (*Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.*, 16 NY3d 257, 264 [2011]). Although the indemnification provisions in the loan agreements and the guaranty are broad, the court does not construe them to suggest that they place on defendants the same duty as insurers. Hence, under the indemnity clauses, defendants are not obligated to pay plaintiff's counsel fees until they are obligated to fully indemnify plaintiff, and the duty to indemnify will not be determined until the Florida cases resolve whether plaintiff engaged in gross negligence, willful misconduct, or any intentional behavior.

The next question is whether plaintiff is entitled to legal costs under provisions of the new loan agreements, wherein each entity defendant agreed to pay plaintiff:

> all fees, costs and expenses incurred by Lender . . . (including . . . any counsel to Lender) . . . in connection with (a) the preparation, negotiation, execution, delivery or enforcement of this Agreement . . . and (b) any investigation, litigation or proceeding related to this Agreement . . . or any act, omission, event or circumstance in any matter related to any of the foregoing.

(NYSCEF 4, 5, ¶ 8.2.)

Under the Guaranty, Friedman "unconditionally and absolutely guarantees to Lender" the payment and performance of the obligations when due (NYSCEF 6 ¶ 2). He guarantees to pay "reasonable attorneys' fees and expenses . . . that may be incurred or advanced by Lender . . . required to be paid by Borrower under the Loan Documents . . . ." (*id.*). He further guarantees to "pay all costs and expenses incurred by Lender . . . in defending or prosecuting any actions, claims or proceedings arising out of or relating to this Guaranty and/or any related agreement, document or instrument on or after the date hereof . . . . (*Id.*, ¶ 15.)

Like the above-treated indemnification provisions, these legal cost provisions are extremely broad, applying to "any and all claims, demands, actions, suits or proceedings," provided that plaintiff's involvement therein relates to the loan agreements. While the advancement of legal costs not included under the general rubric of indemnification is usually discussed in the context of corporate officers and directors, the court finds that the same guiding principles apply to this case, although corporate personnel are not involved. In the corporate context, indemnification and the advancement of legal fees are regarded as separate obligations (*Crossroads*, 105 AD3d at 645; *Schlossberg v Schwartz*, 43 Misc 3d 1224[A], 2014 NY Slip Op 50760[U], *4 [Sup Ct Nassau County 2014]). The issue of an officer's entitlement to advancement of legal costs can be determined summarily; but the right to indemnification is delayed until the conclusion of the matter (*Ficus Invs., Inc. v Private Capital Mgt., LLC,* 61 AD3d 1, 9 [1st Dept 2009] [looking to Delaware law]; *Schlossberg*, 2014 NY Slip Op 50760[U] at * 3-4). Indemnification is the right of an indemnitee to be made whole for any losses incurred in defending a claim, while advancement is the right to receive payment to cover legal fees as the claim is litigated (*see Crossroads ABL LLC v Canaras Capital Mgt., LLC*, 35 Misc 3d 1238 [Sup

Ct NY County 2012], *affd* 105 AD3d 645 [1st Dept 2013]). Funds that have been advanced must be repaid if it ultimately is determined that the recipient is not entitled to indemnification (*Kaloyeros v Fort Schuyler Mgt. Corp.*, 55 Misc 3d 1082, 1086 [Sup Ct Albany County 2017], *affd* 157 AD3d 1152 [3d Dept 2018]; *see also, Booth Oil Site Admin. Group v Safety-Kleen Corp.*, 137 F Supp 2d 228, 236 [WD NY 2000]).

Under the advancement provisions in the new loan agreements and in the guaranty, defendants are obligated to pay plaintiffs' defense costs while the claims against plaintiff are being litigated.

Defendants assumed the previous owners' obligations to procure and maintain insurance naming plaintiff as loss payee and additional insured. Defendants contend that plaintiff should have turned to the insurance companies, including plaintiff's own insurer, for defense costs. The existence of insurance does not prevent the entry of summary judgment against defendants for liability as to legal expenses. Defendants made enforceable promises to pay those expenses.

Lastly, defendants argue that plaintiff is not entitled to summary judgment as it did not adhere to the contractual requirement that defendants consent to plaintiff's choice of counsel per the provision which states:

> Lender agrees to give Borrower reasonable notice of any event of which Lender becomes aware for which indemnification may be required under this Section 15.4, and Lender may elect (but is not obligated) to direct the defense thereof, provided that the selection of counsel shall be subject to Borrower's consent, which consent shall not be unreasonably withheld or delayed.

(NYSCEF 2, 3, loan agreements ¶ 15.4; NYSCEF 6, Guaranty ¶ 24.) Under the loan agreements but not the Guaranty, "Lender reserves the right to retain counsel . . . at its sole cost and expense" (loan agreements, *supra*).

By letters dated April 23, 2019 (NYSCEF 7), plaintiff notified the borrowers and the guarantor about two of the Florida cases. In the letters, plaintiff requested the borrowers' consent to plaintiff's choice of counsel; to wit, that consent "may not be unreasonably withheld or delayed. Please confirm within five (5) business days of the date of this letter that Borrowers consent to PacWest's selection of PacWest's Counsel. If Borrowers fail to respond with their consent within five (5) business days of the date of this letter, Borrowers shall be deemed to have provided the requested consent" (NYSCEF 7 at 3).

Plaintiff sent defendants invoices for its legal expenses as incurred in the Florida cases. For a period of time, defendants reimbursed plaintiff. The parties do not clarify when defendants stopped making the payments. On June 13, 2019, defendants' counsel wrote plaintiff's counsel stating that plaintiff's chosen counsel was too expensive and had no experience with the subject matter underlying the Florida cases. Plaintiff was then asked to use the attorneys chosen by defendants (NYSCEF 37 at 1).

On December 30, 2019, plaintiff's attorney wrote to the borrowers, asking for payment for legal expenses, naming the same attorneys named in the April 23, 2019 letter, and closing with the statement: "We will presume that you have no objection to these continued representations, unless we hear otherwise from you within five business days of this letter's receipt" (NYSCEF 7). The letter advises that those attorneys had been representing plaintiff since the institution of the first two Florida cases.

The guarantor, Leopold Friedman, states that he does not believe that plaintiff asked permission to utilize any counsel. He believes that plaintiff "was merely advising me that it was making a decision to go on its own" (NYSCEF 36). However, plaintiff's April 23, 2019, letter clearly seeks defendant's consent for its choice of counsel. Defendants do not claim that plaintiff acted unreasonably in giving them five business days to respond. After defendants received this letter, they paid plaintiff's legal expenses without objection. Their conduct indicates consent. It can be stated, as a matter of law, that until June 13, 2019, plaintiffs did not violate the contractual provision regarding consent to counsel. It was on June 13, 2019 that defendants registered an objection to plaintiff's attorneys (NYSCEF 37). Whether plaintiff afterward violated the loan agreements by not changing their attorneys is an issue of fact. In any case, even if plaintiff breached the contracts by failing to ask for consent, that does not prevent summary judgment being granted to plaintiff according to the provisions addressing the advancement of legal expenses in the new loan agreements and in the Guaranty.

In conclusion, it is hereby

ORDERED that plaintiff's motion for summary judgment on liability for attorneys' fees and expenses against defendants is granted.

This will constitute the decision and order of the court.

ENTER:

Louis L. Nock

6/9/2022
DATE

LOUIS L. NOCK, 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**