

RBC Capital Mkts., LLC v Talentnet, Inc.
2022 NY Slip Op 33301(U)
September 30, 2022
Supreme Court, New York County
Docket Number: Index No. 652290/2022
Judge: Arlene P. Bluth
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

RBC CAPITAL MARKETS, LLC

Plaintiff,

- v -

TALENTNET, INC.,

Defendant.

-----X

INDEX NO. 652290/2022

MOTION DATE 09/26/2022

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

were read on this motion to/for DISMISSAL.

Defendant’s motion to dismiss is denied.

Background

This action arises out of a contract between plaintiff and defendant in which defendant purportedly marketed itself to plaintiff as a “solutions provider for contingent labor issues.” Defendant found and placed individuals to work for plaintiff. The contract contained an indemnity provision and plaintiff alleges that defendant is attempting to drag it into a wage and hour lawsuit between defendant and a former employee of defendant. Plaintiff claims that defendant refuses to honor the indemnity provision in the contract and so plaintiff brought this case for indemnification.

Plaintiff explains that a former employee of defendant (Qayumi) commenced a lawsuit for wage and hour violations in California in July 2020. Defendant placed this employee at plaintiff as a business analyst in late 2016 and, allegedly, plaintiff fired her in April 2019. Then Qayumi filed a complaint alleging a host of claims, including that plaintiff and defendant jointly

employed her and violated California's Labor Code through her purportedly wrongful termination. Plaintiff says it notified defendant about the lawsuit (which included both plaintiff and defendant as parties) and sought indemnification but defendant refused.

Defendant moves to dismiss on the ground that the claim is not ripe. It insists that this Court lacks subject matter jurisdiction because the obligation to indemnify does not arise until liability is incurred through an actual payment. It claims that it denied plaintiff's demand for indemnification and reserved its rights to defend and indemnify plaintiff until it can evaluate the pending case in California.

In opposition, plaintiff maintains that the agreement it signed with defendant requires defendant to indemnify plaintiff during the pendency of the Qayumi action in California and that it need not wait until after that action is resolved in order to seek the relief requested in the complaint. Plaintiff points out that defendant did not address plaintiff's other causes of action and so those claims should remain, even if the indemnification cause of action is dismissed,

In reply, defendant reiterates that the declaratory judgment claim is not ripe for review and that plaintiff's demand for defense costs is simply premature. Defendant asserts that the breach of contract claim and the breach of the covenant of good faith and fair dealing claim are duplicative to the contractual indemnification claim. Defendant argues that the contribution claim is premature as well.

Discussion

Section 13.02 of the parties' agreement provides that

“Supplier [defendant] will, at its sole cost and expense, indemnify, defend and hold harmless Customer and/or its Affiliates and subsidiaries, with whom they have entered into an executed Statement(s) of Work and are Customers for purposes of that Statement of Work, and their respective officers, directors, employees, contractors, agents, representatives, successors and assigns (collectively, ‘Customer Indemnitees’) from and against any and all Losses

suffered or incurred by any of them arising out of or in connection with a Claim of or for any of the following, whenever made:

....d) by or on behalf of any subcontractors or independent contractors of Supplier, or any of Supplier's personnel (including Supplier Personnel)" (NYSCEF Doc. No. 2, ¶ 13.02[d]).

Claim is defined as "any demand, or any civil, criminal, administrative claim, action or proceeding (including arbitration) asserted, commenced or threatened against an entity or person" (*id.* ¶ 13.01). Losses are defined as "all judgments, awards, settlements, liabilities, damages, liens and claims, and all related costs, expenses and other charges suffered or incurred as a result of or in connection with a Claim, including reasonable attorneys' fees and disbursements, costs of investigation, litigation, settlement and judgment" (*id.*).

The procedure for indemnification is as follows:

"Customer agrees to give Supplier prompt written notice of any Claim for which a Customer Indemnitee seeks indemnification; provided, however, any failure by Customer to provide such notice will not relieve Supplier of its indemnification obligations under the Master Agreement except to the extent Supplier can demonstrate actual prejudice as a result of such failure. Within thirty (30) days after receiving Customer's notice of a Claim, but no later than ten (10) days before the date on which any formal response to the Claim is due, Supplier will notify Customer in writing as to whether Supplier acknowledges its indemnification obligation and elects to assume control of the defense and settlement of the Claim (a "Notice of Election"). If Supplier delivers a timely Notice of Election to Customer, Supplier will have the right to conduct the defense of the Claim and, consistent with the rights of Customer Indemnitees hereunder, all negotiations or its settlement; provided, however, that the Customer Indemnitee(s) may participate in such defense or negotiations to protect its (or their) interests and that any settlement will be for the payment of money by Supplier and will not, without the prior written approval of Customer, obligate or impose liability on Customer or any Customer Indemnitee in any way, including without limitation, to any determination or admission regarding Customer's or any Customer Indemnitee's interest. If Supplier does not deliver a timely Notice of Election, the affected Customer Indemnitee(s) may defend and/or settle the Claim in such manner as it (or they) may deem appropriate, at the cost and expense of Supplier, including payment of any settlement, judgment or award and the costs of defending or settling the Claim. Supplier will promptly reimburse the Customer Indemnitee(s) upon demand for all Losses suffered or incurred as a result of or in connection with the Claim" (*id.* ¶ 13.03).

There is no dispute that the agreement above contains a defense and indemnity provision that requires defendant to indemnify plaintiff for any costs arising out of a litigation involving someone procured by defendant for plaintiff pursuant to their agreement. The “Claim” is the pending litigation in California and the “Losses” include the defense costs expended by plaintiff in the now pending litigation. Therefore, the Court finds that it has subject matter jurisdiction over this case (*Allergan Finance, LLC v Pfizer*, 188 AD3d 402, 403, 135 NYS3d 90 [1st Dept 2020] [finding that a dispute about indemnification was ripe for adjudication where the contractual indemnification clause encompasses defense costs]).

And, of course, “A court may render a conditional judgment on the issue of indemnity pending determination of the primary action in order that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed” (*id.* at 403-04). That empowers the Court to exercise subject matter jurisdiction over plaintiff’s indemnification claims despite the fact that no judgment has yet been entered in the California matter.

Plaintiff asserts five causes of action in its complaint - breach of contract, contractual indemnification, breach of the covenant of good faith and fair dealing, declaratory judgment and for contribution. The Court observes that defendant moved to dismiss all the causes of action but only focused on the indemnification provision in the moving papers. In its memorandum of law in support, defendant made a conclusory argument that the breach of contract, breach of the covenant of good faith and fair dealing and declaratory judgment claims were duplicative but did not cite a basis or case law for that assertion nor did defendant expound upon that claim. The contribution cause of action was not cited at all.

Defendant's attempt to offer an actual justification for the dismissal of the other causes of action in reply is without merit. In the reply, defendant offered substance supporting its claim that the causes of action for breach of contract, breach of the covenant of good faith and fair dealing and declaratory judgment claims were duplicative and mentioned the contribution claim for the first time. Unfortunately, a party may not raise arguments for the first time in reply (*see Erdey v City of New York*, 129 AD3d 546, 546, 11 NYS3d 592 [1st Dept 2015]). Accordingly, the branches of the motion to dismiss those claims is denied.

Summary


To be clear, the Court makes no affirmative finding that plaintiff is entitled to defense costs or indemnification. It merely finds that this matter is ripe for judicial review and the central basis for defendant's motion (that the Court lacks subject matter jurisdiction) is without merit. Plaintiff is entitled to pursue this indemnification and declaratory judgment action at the same time the underlying matter proceeds. The Court observes that declaratory judgment actions are often commenced while the underlying case is pending. Parties need not wait until a final adjudication of that underlying case to seek contractual indemnification.

Accordingly, it is hereby

ORDERED that the motion to dismiss for lack of subject matter jurisdiction is denied.

Conference will be scheduled for October 24, 2022 at 10:30 a.m. By October 17, 2022, the parties are directed to upload 1) a stipulation about discovery signed by all parties, 2) a stipulation of partial agreement concerning discovery or 3) letters explaining why no agreement about discovery could be reached. The Court will then assess whether an in-person conference is necessary (for instance, if a discovery stipulation signed by all parties is submitted, a conference

may not be required). The failure to upload anything by October 17, 2022 will result in an adjournment of the conference.

<u>9/30/2022</u> DATE					 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE