

<b>Iconix Brand Group, Inc. v Horowitz</b>
2022 NY Slip Op 33801(U)
November 7, 2022
Supreme Court, New York County
Docket Number: Index No. 650726/2022
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

ICONIX BRAND GROUP, INC.,

Plaintiff,

- v -

SETH HOROWITZ,

Defendant.

Table with 2 columns: Field Name, Value. Fields include INDEX NO. (650726/2022), MOTION DATE, MOTION SEQ. NO. (001), and DECISION + ORDER ON MOTION.

HON. BARRY R. OSTRAGER

The Court heard oral argument via Microsoft Teams on November 4, 2022 on plaintiff's motion for summary judgment in its favor on the two causes of action in its Complaint (NYSCEF Doc. No. 1) and for judgment dismissing defendant's three counterclaims in his Answer (NYSCEF Doc. No. 12). In accordance with the November 4, 2022 transcript of proceedings and as stated herein, the motion is granted in part and denied in part.

Plaintiff Iconix Brand Group, Inc. ("Iconix") is a brand management company and the owner of a diversified portfolio of brands. Defendant Seth Horowitz was the Chief Operating Officer of Iconix for a period of years until he tendered his resignation by letter dated April 13, 2015 (NYSCEF Doc. No. 30). In the letter, Mr. Horowitz alerted Iconix to certain problematic accounting issues. The central issue in this case is whether Iconix is entitled to be reimbursed by Mr. Horowitz for monies Iconix advanced, and whether Mr. Horowitz is entitled to be indemnified for expenses he incurred, for attorney's fees relating to various investigations and litigation that took place in connection with financial and accounting issues that arose while Mr. Horowitz was COO of Iconix, regarding which Mr. Horowitz ultimately admitted to certain wrongdoing.

A key provision governing this dispute is Article VII, subd. 2(c), of the Restated and Amended By-Laws of Iconix Brand Group, Inc. (NYSCEF Doc. No. 29). That provision reads in relevant part as follows:

No indemnification shall be made to or on behalf of any Indemnitees if a judgment or other final adjudication adverse to him or her establishes that such [Indemnitee's] acts were committed in bad faith or were the result of active and deliberate dishonesty and were material to the cause of action so adjudicated, or that such Indemnitee personally gained in fact a financial profit or other advantage to which he or she was not legally entitled.

Simply stated, Iconix relies on this provision to argue that Mr. Horowitz is not entitled to be indemnified or advanced any fees because of his guilty plea in criminal proceedings and a judgment that was rendered against him in an SEC proceeding, both of which were based on his misconduct in the performance of his duties while COO of Iconix.

Mr. Horowitz argues in opposition that Delaware law requires that each investigation or court proceeding must be examined individually and that Iconix bears the burden to prove that Mr. Horowitz is not entitled to indemnification. Further, in at least some of the matters, fees were incurred related to alleged wrongdoing by the Iconix Chief Executive Officer Neil Cole and with respect to other matters in which Mr. Horowitz is or was cooperating and assisting Iconix in its efforts to resolve the matter in favor of Iconix. At least five separate matters are at issue: (1) the Committee Investigation by the Iconix Board, which did not result in any findings against Mr. Horowitz; (2) the Securities and Exchange Commission (SEC) Investigation; (3) a lawsuit by the SEC which resulted in a consent judgment against Mr. Horowitz; (4) a Criminal Action which resulted in a guilty plea by Mr. Horowitz; and (5) a Department of Justice (DOJ) investigation, which also includes other alleged wrongdoers such as Mr. Cole. During

oral argument, defendant's counsel also referenced fees related to civil claims and privilege claims related to Iconix.

Plaintiff Iconix first seeks summary judgment on the First Cause of Action for a declaratory judgment that defendant Horowitz is not entitled to indemnification under the By-Laws for any fees incurred for the Committee Investigation, the SEC Investigation, the Criminal Action, and the SEC Action, all of which related to the conduct of Mr. Horowitz while COO of Iconix, because those matters all fall within Section 2(c) of Article VII of the By-Laws, quoted above. It cannot be reasonably disputed that the Criminal Action and the SEC Action, which resulted in a guilty plea and a consent judgment respectively, fall within the exception to indemnification in Article VII 2(c) of the By-Laws, quoted above, and Delaware law. Nor is Mr. Horowitz entitled to indemnification for the SEC Investigation because that Investigation led to litigation that resulted in a consent adjudication which confirmed that the acts of Mr. Horowitz were the result of active and deliberate dishonesty and that Mr. Horowitz personally gained a financial advantage to which he was not legally entitled. By contrast, the Iconix Committee Investigation resulted in no direct findings against Mr. Horowitz. Thus, the Court grants plaintiff's motion for summary judgment as to the First Cause of Action to the extent of declaring that Mr. Horowitz is not entitled to be indemnified for any fees incurred in connection with the SEC Investigation, the Criminal Action and the SEC Action. However, plaintiff's request for declaratory relief with respect to the Committee Investigation is denied at this stage of the litigation.

In the Second Cause of Action, plaintiff seeks damages in the amount of \$2,239,622.55 for breach of contract, asserting that Mr. Horowitz failed to pay back fees in that amount

advanced by Iconix in connection with the defense of Mr. Horowitz in the Criminal Action and the SEC Action. The Court grants plaintiff's motion for summary judgment on liability only on that claim. Because of the plea allocution in the Criminal Action and the consent judgment against Mr. Horowitz in the SEC Action, the fees are not subject to indemnification under the By-Laws or Delaware law. However, defendant has created issues of fact which preclude summary judgment on the quantum of damages that Mr. Horowitz must reimburse Iconix. Those issues include, but are not limited to, the amount of fees actually incurred in connection with each case solely on behalf of Mr. Horowitz and whether any of those fees were reimbursed, or may in the future be reimbursed, by an insurer.

The Court denies plaintiff's request for summary judgment dismissing defendant's First and Second Counterclaims for breach of contract for not advancing fees and/or indemnifying Mr. Horowitz for expenses incurred in certain proceedings, not including criminal and civil proceedings against him, based on issues of facts similar to those identified above. The Court also denies plaintiff's request for summary judgment dismissing defendant's Third Counterclaim for attorney's fees to the extent that it may ultimately be determined that the fees are covered by the indemnification provisions in the By-Laws.


The Court grants the motion to amend the caption to substitute Iconix International Inc. for the originally named plaintiff based on a name change, without opposition from defendant. The Clerk is directed to amend the caption to read "*Iconix International Inc. v. Seth Horowitz*" upon plaintiff's e-filing of Form EF-23 available via the NYSCEF Home Page with a copy of this Decision and Order attached directed to the County Clerk.

Counsel shall meet and confer and prepare a Proposed Preliminary Conference Order using the form available on the Part 61 website and efile it by December 1, 2022. The Order shall

contain a Note of Issue deadline no later than 20 months from the date of the Order and a compliance conference date for a specific time on a specific Tuesday morning after the date that document discovery is due. The Proposed Preliminary Conference Order shall be efiled with a letter that includes a dial-in number for the next conference. Counsel shall also advise the Court in the letter whether the parties consent to a referral to the Supreme Court Alternative Dispute Resolution program or whether private mediation is being pursued.

A preliminary conference scheduled for December 7, 2022 at 11:00 a.m.

Dated: November 7, 2022

  
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: