

**Cowen & Co., LLC v Get Me, LLC**

2024 NY Slip Op 31790(U)

May 17, 2024

Supreme Court, New York County

Docket Number: Index No. 653075/2023

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

-----X  
 COWEN AND COMPANY, LLC, ROHIT MANOCHA

Plaintiff,

- v -

GET ME, LLC,

Defendant.

INDEX NO. 653075/2023

MOTION DATE 02/06/2024

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
 MOTION**

-----X  
 HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 45, 46, 48

were read on this motion to/for

DISMISS

Upon the foregoing documents, the motion to dismiss (Mtn. Seq. No. 003) is denied.

The Relevant Facts and Circumstances

Reference is made to a certain letter agreement (the **Cowen Agreement**), dated February 8, 2017, by which Get Me, LLC (**Get Me**) engaged Cowen and Company, LLC (**Cowen**) to perform financial advisory and investment banking activities (NYSCEF Doc. No. 28, at 1). The Cowen Agreement is clear and unambiguous. Pursuant to Section 24 of the Cowen Agreement (the **New York Exclusive Jurisdiction Provision**), the parties agreed that any claim or dispute of any kind whatsoever arising in any way out of or relating to the Cowen Agreement would be litigated in New York, and further provided that New York law would apply to those disputes:

**24. Governing Law and Jurisdiction**

This letter and *any claim or dispute of any kind or nature whatsoever arising out of or in any way relating to this Agreement, directly or indirectly* (including any claim concerning advice provided pursuant to this Agreement), shall be governed by and construed in accordance with the laws of the State of New York. *No such claim or*

*dispute may be commenced, presented or continued in any court other than the court of the State of New York located In the City and County of New York, which court shall have exclusive jurisdiction over the adjudication of such matters*, and the Company and Cowen consent to the jurisdiction of such courts and personal service. Any rights to trial by jury with respect to any claim or proceeding related to, or arising out of, this Agreement are waived by Cowen and the Company.

(*id.*, § 24 [emphasis added]). Thus, Cowen and Get Me anticipated litigating in New York, consented to jurisdiction in New York, agreed that they would not sue each other outside of New York as to any claim or dispute of any kind whatsoever arising out of or in any way relating to the Cowen Agreement, and agreed that no such lawsuit outside of New York could be commenced or maintained, and nothing under the Cowen Agreement prevents litigation from proceeding in New York.

In addition, pursuant to the terms of the Cowen Agreement, the parties provided for indemnification both as to claims between the parties and as to third party claims. In the event of litigation between the parties arising from the engagement contemplated by the Cowen Agreement, pursuant to Section 23 (the **Prevailing Party Provision**), they agreed that the prevailing party would recover reasonable fees and disbursements:

**23. Attorneys' Fees**

In the event of any dispute or litigation or other proceeding between the parties with respect to any provision of this Agreement or arising from the engagement contemplated under this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party any and all of the reasonable fees and disbursements of the prevailing party's attorney to the extent that they relate to such dispute, litigation, or other proceeding.

(*id.*, § 23).

In the event of third-party claims, the parties agreed pursuant to Section 14 and Schedule I (the **Third-Party Indemnification Provision**) to the Cowen Agreement that Get Me would broadly indemnify Cowen for losses, claims, damages and expenses arising in any manner out of or in connection with the Cowen Agreement or with any services Cowen rendered, unless there is a final judicial determination that these costs resulted primarily from gross negligence or willful misconduct on Cowen's part. The parties further agreed to immediate reimbursement upon demand of such expenses:

#### **14. Indemnification**

The Company and Cowen agree to the provisions with respect to the Company's indemnity of Cowen and other matters set forth in Schedule I, the terms of which are incorporated herein in their entirety.

...

#### **Schedule I**

The Company agrees to indemnify Cowen, each controlling person and each of their respective directors, officers, employees, agents, affiliates and representatives (each of the foregoing, an "indemnified Party") and hold each of them harmless against any and all losses, claims, damages, expenses, liabilities, joint or several (collectively, "Liabilities") to which the Indemnified Parties may become subject arising in any manner out of or in connection with the letter agreement to which this Schedule I is attached (the Letter Agreement") or otherwise in connection with any services rendered by Cowen whether before or after the date of this Letter Agreement, unless it is finally judicially determined that the Liabilities resulted primarily from the gross negligence or willful misconduct of Cowen. The Company further agrees to reimburse each Indemnified Party immediately upon request for all expenses (including attorneys' fees and expenses) as they are incurred in connection with the investigation of, preparation for, defense of, or providing evidence in, any commenced or threatened action, claim, proceeding or investigation (including, without limitation, usual and customary per diem compensation for any Indemnified Party's involvement in discovery proceedings or testimony), in connection with or as a result of either Cowen's engagement or any matter referred to in the Letter Agreement whether or not Cowen is a party to such proceeding. The Company also agrees that no Indemnified Party shall have any liability (whether direct or indirect, in contract or tort or otherwise) to the Company or its securityholders or creditors related to or arising out of the engagement of Cowen pursuant to, or the performance by Cowen of the services contemplated by, the Letter Agreement, unless it is finally judicially determined that such liability resulted primarily from the gross negligence or willful misconduct of Cowen. The Company and Cowen will promptly notify the other party in writing of the assertion against it or any other person of any claim or the commencement

of any action, proceeding or investigation relating to or arising out of any matter referred to in the Letter Agreement, including on indemnified Party's services thereunder; provided that Cowen's failure to notify will not affect the indemnified Parties' right to indemnification except to the extent the Company is materially prejudiced thereby.

The Company agrees that, without an indemnified Party's prior written consent, which consent shall not be unreasonably withheld, it will not settle, compromise or consent to the entry of any judgment in any commenced or threatened claim, action, proceeding or investigation in respect of which indemnification could be sought under the indemnification provisions of the Letter Agreement (whether or not Cowen or any other Indemnified Party is an actual or potential party to such claim, action, proceeding or investigation).

The Company and Cowen agree that if any indemnification or reimbursement sought pursuant to the preceding paragraph is for any reason unavailable or insufficient to hold it harmless (except by reason of the gross negligence or willful misconduct of Cowen) then, whether or not Cowen is the person entitled to Indemnification or reimbursement, the Company and Cowen shall contribute to the Liabilities for which such indemnification or reimbursement is held unavailable in such proportion as is appropriate to reflect (a) the relative benefits to the Company on the one hand, and Cowen on the other hand, in connection with the transaction to which such indemnification or reimbursement relates, (b) the relative fault of the parties, and (c) other equitable considerations; provided, however, that in no event shall the amount to be contributed by Cowen exceed the fees actually received by Cowen under the Letter Agreement. The Company agrees that for the purposes of this paragraph the relative benefits to the Company and any Indemnified Party of the contemplated transaction (whether or not such transaction is consummated) shall be deemed to be in the same proportion that the aggregate cash consideration and value of securities or any other property payable, exchangeable or transferable (or contemplated to be payable, exchangeable or transferable) in such transaction bears to the fees paid or payable to Cowen under the Letter Agreement.

(NYSCEF Doc. No. 28, § 14 & Schedule I). Lastly, the parties agreed that the indemnification, attorneys' fees, governing law, and choice of forum clauses survive expiration of the Cowen Agreement (*id.*, § 21).

By way of background, Get Me, Dr. Richard Benavides (former board member of and an investor in Get Me), and Get It Holdings, LLC, Get Me's holding company (**GIH**) brought an action in the District Court sitting in Dallas County, Texas, 160<sup>th</sup> Judicial District (the Texas

**Action;** NYSCEF Doc. No. 29)<sup>1</sup> against Mr. Roscoe F. White III, Mr. John W. Castle (together with Mr. White, the **Executives**), Granite Family iProperties, LLC, Cowen, Mr. Rohit Manocha, and a number of additional corporate entities (*id.*, ¶¶ 1-34, 49, 51, 81) alleging (i) that the Executives breached their fiduciary duties and (ii) that Cowen and Mr. Manocha (collectively, the **Cowen Defendants**) assisted the Executives in breaching their fiduciary duties and that the Cowen Defendants profited from this conduct by obtaining compensation beyond that which is contemplated by the Cowen Agreement (*id.*, ¶¶ 99-135).

The Cowen Defendants moved to dismiss, arguing that the claims asserted against them by Get Me must be brought in New York pursuant to the New York Exclusive Jurisdiction Provision. The Texas court denied this motion (the **Texas Decision**; NYSCEF Doc. No. 34, at 2). The Cowen Defendants then sought mandamus review. The Court of Appeals for the Fifth District of Texas at Dallas denied mandamus review, finding, among other things, that the Cowen Defendants did not lack an adequate remedy because they could appeal (NYSCEF Doc. No. 38). The Cowen Defendants indicate that they are now appealing the Texas Decision (NYSCEF Doc. No. 35).

In this case properly brought in New York, the Cowen Defendants have sued pursuant to the Third-Party Indemnification Provision seeking immediate reimbursement from Get Me for certain expenses incurred in defending against the claims levelled against them by third parties GIH and Mr. Benavides (but not the inter-party claims levelled against them by Get Me at this time; NYSCEF Doc. No. 1, ¶ 5).

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<sup>1</sup> *Dr. Richard Benavides, et al. v. Roscoe "Trey" F. White III, et al.*; Case No. DC-22-02983  
653075/2023 COWEN AND COMPANY, LLC ET AL vs. GET ME, LLC  
Motion No. 003

Get Me has moved to dismiss (Mtn. Seq. No. 003) pursuant to CPLR 3211(a)(7) for failure to state a claim and CPLR 3211(a)(4) in favor of the Texas Action and, alternatively, for a stay pursuant to CPLR 3211(a)(4) and 2201 pending resolution of the Texas Action. The arguments fail.

#### DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a)(7), 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, 88 [1994]).

In interpreting contracts under New York law, courts give meaning to every sentence, clause and word of the contract (*see Travelers Cas. And Sur. Co. v Certain Underwriters at Lloyd's of London*, 96 NY2d 583, 594 [2001]). When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed, and such a promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances (*Hooper Assoc., Ltd. V AGS Computers, Inc.*, 74 NY2d 487, 491-92 [1989]). When the parties fail to define the scope of the promise, however, a court must interpret the language and determine whether it is limited to attorney's fees incurred by a party in actions involving third parties or also includes those incurred in prosecuting a suit against the other party for claims under the contract (*id.*, 491).

Without language of unmistakable clarity, a court should not find an agreement to indemnify attorneys' fees in the case of inter-party disputes (*id.*). The *Hooper* Court did not address the interplay between third-party indemnity and inter-party indemnity provisions. Indeed, the holding of *Hooper* was that because the indemnification provision at issue in that case lacked unmistakable clarity that it was intended to cover inter-party indemnity, the indemnification provision was more properly understood as typical of that covering third-party indemnity only (*id.*). Thus, *Hooper* itself does not directly answer the issue raised in this case.

As discussed above, at issue in this case is *Hooper's* application to an agreement providing for both third-party indemnity (*i.e.*, the Third-Party Indemnification Provision) and inter-party indemnity (*i.e.*, the Prevailing Party Provision) where the underlying lawsuit involves certain potentially overlapping inter-party and third-party claims and whether and to what extent indemnity is appropriate under those circumstances. The parties do not cite a New York state court case that has addressed this issue. They do however cite federal court cases which, although not controlling, are certainly instructive.

*In re Refco Sec. Litig.* (890 F Supp 2d 332, 355 [SDNY 2012]) involved a contract which provided for indemnification of attorneys' fees incurred in defending third-party claims but not inter-party claims (*In re Refco Sec. Litig.*, 890 F Supp 2d 332, 350 [SDNY 2012]). As relevant, the court (Rakoff, J.) applied *Hooper* and held that fees expended in defending against inter-party claims that were overlapping were not recoverable but so-called incremental fees – *i.e.*, non-overlapping, incrementally higher expenses resulting from the presence of the third-party

and its claims (collectively, **Incremental Fees**) were not barred from recovery pursuant to the third party indemnification provision:

First, New York law gives a strong preference to contracting parties paying their own legal expenses in suits between them. The basis for that preference is adhering to the American Rule and the policies that support it, discussed above. Given that strong preference—and presumption of the parties' intent—it undermines the American Rule to require the loser to pay legal expenses related to a third party when those same expenses are also allocated to the case against the contracting party. Given the all-or-nothing nature of the decision to be made—all legal expenses are indemnified in the multi-party action or not—the rule of unmistakable clarity and adherence to the American Rule certainly cautions against awarding legal expenses that in effect indemnify a party for legal expenses in a suit between the contracting parties. If the presence of the third-party makes no practical difference in the expenditure of attorney fees, then the suit should be treated as one solely between the contracting parties and so subject to the rule of unmistakable clarity.

Second, the *Tecnoclima* decision, while perhaps short on analysis, nonetheless held that legal expenses could not be recovered where the party to an indemnity agreement expends fees to litigate against overlapping claims and defenses by a contracting party joined with a non-contracting party. DPM has not cited a case that comes out the other way, i.e., rejecting the American Rule when legal expenses are directed to such overlapping claims.

Third, it is to be remembered that there is a question whether DPM contracted for indemnification of attorney fees at all. As stated above, the indemnification in \*356 SMFF's favor specifically calls for payment of attorney fees and the indemnification in DPM's favor does not. That does at all not mean that DPM's claim for attorney fees expended with respect to claims of a third party in an independent lawsuit would be dismissed on the pleadings—because the indemnity provision is at least ambiguous on whether it covers DPM's attorney fees in third-party suits. But the ambiguity does mean that, all things being equal, the indemnity provision should be interpreted to limit recovery of attorney fees rather than to grant such recovery.

Given all these factors, DPM's claim that it is entitled to indemnification of legal expenses related to PlusFunds' claims must be rejected as not contemplated by the contracting parties—at least insofar as those expenses replicate those incurred with respect to SMFF's claims.

...

It must be emphasized, however, that this holding is **not applicable to fees expended solely with respect to PlusFunds. While PlusFunds and SphinX are largely bringing overlapping claims, it may well be the case that some of PlusFunds' claims are or will be separate.** For example and most obviously, PlusFunds' proof of damages—loss

of enterprise value, etc.—will differ from SMFF’s proof. Expert witnesses may differ on such claims. Notably, the court in *Tecnoclima* denied the claim for attorney fees as to the affiliates because those claims “did not result in the expenditure of additional fees.” *Id.* The clear import of that reasoning is that if the claims had resulted in the expenditure of additional fees, they would have been compensable under the indemnity agreement—because those would be fees expended solely with respect to claims against a third party.

(*id.*, at 355-356 [emphasis added]).

*In re Steinberg* (2017 WL 1184314, at \*9-10 [SDNY Mar. 29, 2017]) also does not prevent recovery for Incremental Fees. In that case, and on a fully developed record and following trial, the court (Schofield, J.) relying on *Hooper* and *In re Refco* held that because there were no Incremental Fees in the record, no recovery under the third-party indemnification provision was appropriate:

The third-party investors’ claims, allegations and evidence overlap with those asserted by the contracting party, Jaroslawicz. The third-party investors and Jaroslawicz assert the same causes of action in the Complaint. Most important, the factual allegations and proof overlap: both the third-party investors and Jaroslawicz alleged in the Complaint and asserted at trial that they were fraudulently induced to invest based on Steinberg’s purported misrepresentations regarding his access to family or personal wealth and his promise to pay interest on the Romanian mortgages. As Steinberg contends, the claims of Herskowitz, Lipschitz and Freund were “all premised on the central lie originated by Jaroslawicz.”

(*In re Steinberg*, 2017 WL 1184314, at \*9-10 [SDNY Mar. 29, 2017]). Significantly, the procedural posture of *Steinberg* was different than the case in front of this court. In that case, there was a fully developed factual record. The case in front of this court is at the motion to dismiss stage. As a factual matter, there may well be Incremental Fees that are recoverable and Get Me is simply not entitled to dismissal at this stage based on their argument that it is factually impossible that the Cowen Defendants could have Incremental Fees such that they must wait to determine whether they are in fact the victor in the Texas Action. Requiring this as Get Me so

urges would defeat the clear and unmistakable clarity reflected in the Cowen Agreement that the parties envisioned Cowen's right to demand immediate reimbursement as to true third party claims during any ensuing third-party litigation.

Dismissal under CPLR 3211(a)(4) is also not appropriate under these circumstances. Get Me agreed that claims arising under the Cowen Agreement must be litigated in New York. It is beyond cavil that the indemnification claims at issue arise exclusively pursuant to the terms of the Cowen Agreement. Thus, the Texas Action is simply not properly considered a prior pending lawsuit requiring dismissal, and holding as such would appear to violate the clear terms of the mandatory forum selection clause in the New York Exclusive Jurisdiction Provision (*Carlyle CIM Agent, L.L.C. v Trey Resources I, LLC*, 148 AD3d 562, 564 [1st Dept 2017]). This dispute among the parties decidedly belongs in New York.

Lastly, the court notes that a stay under the circumstances is equally inappropriate. The parties expressly provided for immediate reimbursement of costs and expenses incurred in connection with third-party claims pursuant to the terms of the unambiguous Cowen Agreement. Staying this lawsuit would violate the clear unequivocal expressed intent of the parties.

The Court has considered Get Me's remaining arguments and finds them unavailing.

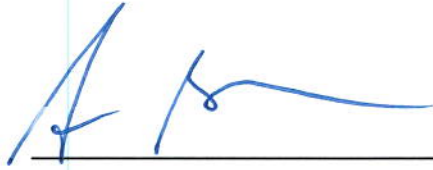
Accordingly, it is hereby

ORDERED that the motion is denied; and it is further

ORDERED that Get Me shall file an answer within 30 days of this decision and order; and it is further

ORDERED that the parties shall appear for a preliminary conference on June 10, 2024, at 11:30 am.

5/17/2024  
DATE



CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE