

**White Oak Global Advisors, LLC v Scopetta**

2025 NY Slip Op 30813(U)

March 11, 2025

Supreme Court, New York County

Docket Number: Index No. 652992/2024

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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WHITE OAK GLOBAL ADVISORS, LLC,

Plaintiff,

- v -

GEORGE M SCOPETTA, MORGAN L SWING,

Defendant.

INDEX NO. 652992/2024

MOTION DATE 11/22/2024

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

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GEORGE SCOPETTA

Plaintiff,

-against-

PRIME PLASTIC SURGERY MANAGEMENT LLC, PPS MSO  
HOLDINGS LLC

Defendant.

Third-Party  
Index No. 595654/2024

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HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 53, 54, 55, 56, 59, 67, 72

were read on this motion to/for

DISMISSAL

In the third-party action, defendant/third-party plaintiff George Scopetta seeks advancement and indemnification from third-party defendant Prime Plastic Surgery Management LLC (Prime) for the case brought against him by plaintiff White Oak Global Advisors, LLC (White Oak) in the main action under Index No. 652992/2024. Prime now moves to dismiss the third-party complaint under CPLR 3211(a)(1) and (a)(7). For the reasons stated below, Prime’s motion to dismiss is denied.

BACKGROUND

George Scopetta was the former president of Prime who had entered into a loan agreement and Guaranty with plaintiff White Oak on July 20, 2022 (see NYSCEF # 1 – Complaint ¶ 10; NYSCEF # 56 – Prime’s mol at 3-4). Scopetta, as the

Sole Board Member of Prime and PPS MSO Holdings (Holdings), took a \$10,000,000 loan on behalf of Prime and signed the Guaranty on that loan (NYSCEF # 10 – Third-party complaint ¶’s 18-20). In February 2024, Holdings turned all of its shares of Prime to White Oak. On February 1, 2024, Prime defaulted on the loan. When Prime defaulted on the loan, White Oak sought to recover the loan amount from Scopetta under the Guaranty (NYSCEF # 1 - Complaint ¶’s 8-11; Prime’s mol at 4-5). Scopetta in turn seeks indemnification from Prime under Prime’s Operating Agreement (NYSCEF # 55 – Operating Agreement).

Prime, in urging dismissal of Scopetta claims for an advance and indemnification from Prime, reasons that because Scopetta personally signed the Guaranty and loan, he should be liable to White Oak for the \$10,000,000 loan plus interest, costs, and fees (Prime’s mol at 4). Prime posits that because Scopetta never alleged that he is or ever was a member of Prime (*id.* at 3), Prime need not indemnify Scopetta given that the Operating Agreement governing indemnification covers only Prime members and officers. Prime’s Operating Agreement clearly and indisputably states that Prime “shall indemnify and defend the Members and the officers of [Prime]” (*id.* at 10 quoting § 4.4.2 of the Operating Agreement). Prime reiterates that “by Scopetta’s own admission and the indisputable documentary evidence in the record, Scopetta was not an officer of Prime at the relevant time period (*id.*). Prime informs that White Oak had removed Scopetta as president and board member as of February 7, 2024, in the notice on its first demand for payment on the loan (*id.* at 5, 11). Prime adds that § 4.4.2 benefits only members and officers whose actions were taken “in good faith” and in “the best interests of [Prime]” (*id.* at 12). Prime posits that Scopetta’s failure to comply with “Guaranteed Obligations” is not in Prime’s best interest (*id.*). Prime further casts the loan transaction by Scopetta as fraudulent so to evade indemnification by Prime; the Operating Agreement carves out coverage for “willful misconduct or gross negligence.” (*id.* at 12-13 quoting § 4.4.2 of the Operating Agreement;).

Prime raises a separate point that the Guaranty’s subrogation provision also bars Scopetta’s claims for advancement and indemnification (*id.* at 15-16). Prime concludes that Scopetta must pay his Guaranteed Obligations to White Oak before asserting a claim against Prime (*id.* at 17).

Scopetta responds that he is seeking indemnification for his acts taken in the best interest of Prime when he was its president and board member (Scopetta’s mol at 5-6). Scopetta points out that at the time Prime defaulted on its payments to White Oak and when White Oak issued its demand in February 2024, he was still Prime’s president and board member. Scopetta continues that while White Oak’s demand letter of February 7, 2024, also removed him from office and the board, this overlap of events does not remove the fact that he was still president and board member then. Scopetta alleges that while he was president and board member on February 1, White Oak had instructed Prime’s Chief Financial Officer to stop

paying the loan (*id.* at 7). The non-payment causing the default is of White Oak's own making (*id.*).

As for Prime's argument that the Guaranty barred Scopetta from seeking indemnification, Scopetta argues that subrogation is not the same as indemnification and distinguishes the two. And citing the bankruptcy case, *In re Lopes*, as Prime also does, Scopetta clarifies that "[s]ubrogation is defined as the substitution of one party for another whose debt the party pays . . ." (*In re Lopes*, 339 BR 82, 90 [SDNY 2006]). Scopetta asserts that he is looking to Prime to defend and indemnify him White Oak's action against him personally under the Guaranty that he had signed for Prime's benefit.

### 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 into any cognizable legal theory" (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]). Significantly, "whether a plaintiff...can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss" (*Phillips S. Beach LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 497 [1st Dept 2008], *lv denied* 12 NY3d 713 [2009])

At the same time, "[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference" (*Morgenthau & Latham v Bank of New York Company, Inc.*, 305 AD2d 74, 78 [1st Dept 2003] [internal citation and quotation omitted]). However, dismissal based on documentary evidence under 3211(a)(1) may result "only when it has been shown that a material fact as claimed by the pleader is not a fact at all and no significant dispute exists regarding it" (*Acquista v New York Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001]), quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Prime's arguments in support of its motion to dismiss the third-party complaint focuses on its claim that Scopetta is not a Prime member to amplify that the indemnification provision of the Operating Agreement excludes non-members of Prime (i.e. "Scopetta does not allege that he is or was ever a member of Prime.") (NYSCEF # 56 at 3). This claim is made despite White Oak's complaint that alleges Scopetta was the President and board member of Prime, and Scopetta's own allegations saying the same as White Oak. Further, Prime's arguments are largely spurious as they are unsupported.<sup>1</sup> Except for allegations involving the Operating Agreement, the allegations are asserted only in its brief with no reference to any evidence (i.e. Scopetto allegedly turned over his asset to his wife, co-defendant

<sup>1</sup> The only exhibit/evidence Prime submitted in support of its motion is the Operating Agreement (NYSCEF # 55).  
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Morgan Swing (*id.* at 13)). In other words, it is only Prime’s attorney making allegations and asserting “facts” for its motion to dismiss the third-party complaint against it.

In any event, Scopetta’s allegation that he was President and board member of Prime at the crucial times including when he entered into the loan agreement and the Guaranty with White Oak, on behalf of Prime, and when the demand for payment was first made are sufficient to state a cause of action seeking advance and indemnification. Further, the only document Prime proffers to show the contrary do not definitively resolve the issue. Whether Scopetta was Prime’s member or president on February 7 when White Oak allegedly effectively removed Scopetta from office or whether Scopetta can still benefit from § 4.4.2 cannot be answered at this juncture.

Prime’s subrogation argument to bar Scopetta from bringing this action for indemnification is unpersuasive. Scopetta’s motion is for advancement and indemnification, not substitution, by Prime. The changed ownership of Prime’s shares does not speak to the Operating Agreement, and Prime does not so indicate.

And while Prime infuses fraud in Scopetta’s undertaking of a loan on Prime’s behalf, this allegation would require more than arguments in a brief. Prime’s remaining arguments on Scopetta’s claims for a constructive trust and derivative claims also require some basis in fact and law.

In sum, Prime’s motion to dismiss the third-party complaint is denied. As such, Prime’s request by letter to stay discovery pending resolution of this motion (NYSCEF # 104) is denied as moot. Accordingly, it is

ORDERED that third-party defendant Prime Plastic Surgery Management LLC’s motion to dismiss third-party plaintiff George M. Scopetta’s third-party complaint is denied; it is further

ORDERED that third-party plaintiff shall serve a copy of this Order, with notice of entry, on the Clerk of the Court and on all parties; it is further

ORDERED that the parties shall proceed with discovery on the third-party action and appear for a status conference on April 2, 2025 at 2:00 pm via Microsoft Teams.

3/11/2025

DATE



MARGARET A. CHAN, J.S.C.

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

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