

Thomas v G2 FMV, LLC
2018 NY Slip Op 30650(U)
April 11, 2018
Supreme Court, New York County
Docket Number: 152318/2015
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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PATRICK J. THOMAS,

Index No.: 152318/2015

Plaintiff,

DECISION & ORDER

-against-

G2 FMV, LLC, G2 INVESTMENT GROUP, LLC,
JONATHAN TODD MORLEY, TREVOR NIELSON, and
DORI VICKEN KARJIAN,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Familiarity with this action is assumed.¹

Currently before the court is a motion by plaintiff Patrick J. Thomas for partial summary judgment against (1) defendant G2 FMV, LLC (FMV) on plaintiff’s fourth cause of action for advancement and indemnification related to the first (malicious prosecution) and third (breach of contract) causes of action; and (2) defendant G2 Investment Group, LLC (Group) (together with FMV, G2) on the fifth cause of action for advancement and indemnification related to the second cause of action (defamation). G2 opposes the motion. For the reasons that follow, plaintiff’s motion is granted.

Plaintiff is a former member of FMV and a former Chief Operating Officer of Group (a subsidiary of FMV). FMV and Group are Delaware LLCs that are governed by separate

¹ “In short, ‘plaintiff alleges that, for improper purposes, defendants brought an action for a declaration that he resigned from [Group] without ‘Good Reason’ under [FMV]’ operating agreement.’ *Thomas v G2 FMV, LLC*, 147 AD3d 700 (1st Dept 2017), *aff’g*, 2016 WL 320622 (Sup Ct, NY County 2016). This court held, and the Appellate Division affirmed, that, *inter alia*, ‘[t]he complaint states causes of action for malicious prosecution and defamation as against the individual defendants who served as corporate officers by alleging that those defendants participated in the commission of the torts.’ *See id.* at 701.” Dkt. 343 at 1. References to “Dkt.” followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing (NYSCEF) system.

operating agreements, respectively dated January 5, 2011 and June 30, 2010. *See* Dkt. 297 (the FMV Agreement); Dkt. 298 (the Group Agreement) (collectively, the Operating Agreements).

The only provisions of the Operating Agreements at issue are their advancement and indemnification clauses. The Operating Agreements are governed by Delaware law.²

Section 4.7 of the FMV Agreement provides that FMV:

shall indemnify and hold harmless, to the fullest extent permitted by law, (i) each Member, (ii) each officer of the Company [i.e., FMV], (iii) each current or former member of the Management Committee ... (individually, an “Indemnified Party”), as follows:

(a) The Company **shall indemnify** and hold harmless, to the fullest extent permitted by law, any Indemnified Party from and against any and all losses, claims, damages, liabilities, expenses (including legal fees and expenses), judgments, fines, settlements, and other amounts (“Indemnified Costs”) arising from all claims, demands, actions, suits, or proceedings (“Actions”), whether civil, criminal, administrative, or investigative, in which the Indemnified Party may be involved, or threatened to be involved, as a party or otherwise **arising as a result of its status as** (i) a Member of the Company, (ii) a member of the Management Committee of the Company, or (iii) an officer, agent, employee, consultant, or Affiliate of the Company, **regardless of whether the Indemnified Party continues in such capacity at the time any such liability or expense is paid or incurred, and regardless of whether any such Action is brought by a third party, a Member, or by or in the right of the Company;** provided, however, that no such Person shall be indemnified hereunder for any Indemnified Costs which proximately result from such Person’s gross negligence or willful misconduct or his material breach of this Agreement.

² “Delaware adheres to the ‘objective’ theory of contracts, i.e. a contract’s construction should be that which would be understood by an objective, reasonable third party.” *NBC Universal v Paxson Commc’ns Corp.*, 2005 WL 1038997, at *5 (Del Ch 2005). “The proper construction of any contract ... is purely a question of law, so we review questions of contract interpretation de novo. Our objective is to determine the intent of the parties from the language of the contract. This inquiry should focus on the parties’ shared expectations at the time they contracted, but because Delaware adheres to an objective theory of contracts, the ‘contract’s construction should be that which would be understood by an objective, reasonable third party. If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract, or to create an ambiguity.” *Exelon Generation Acquisitions, LLC v Deere & Co.*, 176 A3d 1262, 1266-67 (Del 2017) (citations and quotation marks omitted).

Dkt. 297 at 17 (emphasis added).³

G2 contends that “[o]nly a defined ‘Indemnified Party’ is entitled to indemnification or advancement under the Agreement,” that “the definition of Member expressly ‘does not include any Person who has ceased to be a Member of the Company,’” and that, therefore, “under the plain terms of the [FMV] Agreement, only a current Member qualifies as an Indemnified Party.” *See* Dkt. 320 at 9-10. G2 is wrong. While section 4.7 does not utilize the expression “Former Member”, as emphasized above, this section specifically provides that a Member receiving indemnification does not forfeit his indemnification rights if he ceases being a Member. *See* Dkt. 297 at 17 (“The Company shall indemnify and hold harmless ... (i) a Member of the Company ... regardless of whether the Indemnified Party continues in such capacity at the time any such liability or expense is paid or incurred.”).

This action was commenced in March 2015, and the court ruled in February 2016 that plaintiff is entitled to indemnification. *See* Dkt. 103.⁴ Plaintiff ceased being a Member on June 9, 2016, when he executed a Unit Purchase & Settlement Agreement as part of the settlement of the action in which he was sued by G2. *See* Dkt. 281 (the Settlement Agreement). While section

³ G2 does not dispute that indemnification under section 4.7(a) is subject to mandatory advancement under section 4.7(b). *See* Dkt. 297 at 17-18.

⁴ On February 28, 2017, the Appellate Division affirmed, holding, in pertinent part:

The indemnification claim was correctly sustained with respect to the malicious prosecution claim and dismissed with respect to the defamation claim. The indemnification provision in the operating agreement covers claims arising out of plaintiff’s status as a member of [FMV]; the declaratory judgment action was brought to preclude plaintiff from collecting the fair market value of his units as a member of [FMV]. However, the provision does not apply to claims arising out of plaintiff’s status as an employee of [Group], and the defamation claim is based upon plaintiff’s actions as the chief operating officer of [Group].

Thomas, 147 AD3d at 701.

3(i) of the Settlement Agreement provides that G2 “will have and possess exclusive right, title and interest in the Repurchase Units and all other attending rights will be vested in G2 as set forth in the [FMV] Agreement” [*see id.* at 5], nowhere in the Settlement Agreement does it address plaintiff’s right to indemnification and advancement by virtue of his status as a former Member. Since the FMV Agreement expressly provides that former Members retain their indemnification rights when they give up their membership, the fact that plaintiff gave up his membership in the Settlement Agreement cannot mean he lost his right to indemnification. In other words, for the Settlement Agreement to deprive plaintiff of his indemnification rights as a former Member, it would have had to say so. It does not.

As for the question of whether the scope of the claims covered by section 4.7 includes plaintiffs’ claims for malicious prosecution and breach of contract, both this court and the First Department already held in this action that the malicious prosecution claim is covered. *See Thomas*, 147 AD3d at 701. While both this court and the First Department held that section 4.7 does not cover defamation [*see id.*], there has never been a ruling in this action as to whether the breach of contract claim is covered. That said, as the First Department explained, section 4.7 “covers claims arising out of plaintiff’s status as a member of [FMV].” *See id.* Plaintiff’s breach of contract claim is covered under section 4.7 because it concerns his right, as a Member, to certain financial information under section 5.1 of the FMV Agreement. *See Dkt. 109* at 33.

As for the Group Agreement, it provides in section 3.4 that:

The Company [i.e., Group] **shall indemnify** and hold harmless, to the fullest extent permitted by law, ... (iii) **each current or former officer of the Company**, in its capacity as such ... as follows:

(a) The Company **shall indemnify** and hold harmless, to the fullest extent permitted by law, any Indemnified Party (other than a Member against whom an Action is initiated for or on behalf of the Company) from and against any and all losses, claims, damages, liabilities, expenses (including legal fees and other

professional fees and expenses), judgments, fines, surcharges, tax penalties, settlements, and other amounts (“Indemnified Costs”) arising from all claims, demands, actions, suits, or proceedings (“Actions”), whether civil, criminal, administrative, or investigative, in which the Indemnified Party may be involved, or threatened to be involved, as a party or otherwise **in any way related to or arising out of this Agreement, the Company or the management or administration of the Company or in connection with the business or affairs of the Company or the activities of such Indemnified Party on behalf of the Company**; provided, however, that no such Person shall be indemnified hereunder for any Indemnified Costs that proximately result from such Person’s gross negligence, bad faith, deliberate dishonesty, fraud or willful misconduct or such Person’s material breach of this Agreement.

Dkt. 298 at 16 (emphasis added).⁵

G2 does not dispute that former officers of Group, such as plaintiff, are entitled to indemnification under section 3.4. Rather, G2 argues that the section “does not provide for advancement and indemnification of affirmative claims for money damages **asserted by an indemnified party.**” *See* Dkt. 320 at 10 (emphasis added). G2 contends that section 3.4 “only contemplates coverage for fees incurred in defending an action.” *See id.* In making this argument, G2 relies on section 3.4(g), which requires, in an action *against* the Indemnified Party, the Indemnified Party to provide certain specified cooperation to the company and its insurance carrier. *See* Dkt. 298 at 17. But it does not follow that just because section 3.4(g) requires cooperation in an action in which the Indemnified Party is a defendant, that section 3.4(a) *only* covers such actions. There is no conceptual need for a cooperation clause in an action in which plaintiff is the Indemnified Party. What matters, by contrast, is whether section 3.4(a), on its face, expresses an intent to cover actions in which the Indemnified Party is a plaintiff.

Section 3.4 does not frame its scope using the nomenclature of “plaintiff” and “defendant”. Rather, it states that its scope includes actions in which the Indemnified Party is

⁵ Like the FMV Agreement, section 3.4(b) of the Group Agreement provides for mandatory advancement. *See* Dkt. 298 at 16-17.

“involved” that “in any way relate[] to or aris[e] out of this Agreement, the Company or the management or administration of the Company or in connection with the business or affairs of the Company or the activities of such Indemnified Party on behalf of the Company.” The question, therefore, is not whether the Indemnified Party is a plaintiff, but whether the subject matter of the lawsuit fits within this described scope. In the prior action, the First Department held that the FMV Agreement covered plaintiff’s affirmative claims (which were counterclaims in that action), and that “[i]ndemnification for [Thomas’] personal claims (that is, claims that solely involve Thomas’ personal interests) is not precluded by Delaware law.” *See G2 FMV, LLC v Thomas*, 135 AD3d 421, 423 (1st Dept 2016). The scope of covered claims under section 3.4 of the Group Agreement does not appear to be narrower than those covered by section 4.7 of the FMV Agreement. *Compare* Dkt. 297 at 17 (covering all claims related to plaintiff’s status as Member), *with* Dkt. 298 at 16 (covering all claims “in any way related to or arising out of this Agreement, the Company or the management or administration of the Company or in connection with the business or affairs of the Company or the activities of such Indemnified Party on behalf of the Company.”). It follows from the rationale of the First Department that section 3.4 of the Group Agreement covers plaintiff’s affirmative claims.⁶

⁶ The Delaware authority cited by G2 is inapposite. *See Duthie v CorSolutions Med., Inc.*, 2009 WL 1743650, at *2 (Del Ch 2009). The court in *Duthie* stated that a defamation claim related to a no longer extant underlying case (here, the prior action) is not defensive in nature. *See id.* However, G2’s reliance on *Duthie* is misplaced because the advancement language in *Duthie* was expressly limited to defensive claims. *See id.* at *2 n.12 (“The right to indemnification conferred in this Article Twelfth shall include the right to be paid by the Company the expenses incurred **in defending** any such proceeding in advance of its final disposition.”) (emphasis added). Here, by contrast, the scope of plaintiff’s indemnification rights under the Group Agreement are not caveated with this narrow limitation, but rather, as discussed herein, its scope is far broader. Likewise, the operating agreement in the other Delaware case cited by G2 contains a similar limitation. *See Donohue v Corning*, 949 A2d 574, 576 (Del Ch 2008) (“incurred in connection with the **defense** ...”) (emphasis added).

That said, and as noted earlier, the First Department held that plaintiff's defamation claims are not covered by section 4.7 of the FMV Agreement because the alleged defamation concerned plaintiff's status as an employee of Group (as opposed to his status as a Member of FMV). *See Thomas*, 147 AD3d at 701. This holding, however, is not determinative of the question of whether plaintiff's defamation claim is covered by section 3.4 of the Group Agreement because, unlike section 4.7 of the FMV Agreement, section 3.4 covers claims related to plaintiff's employment. *See Dkt. 298* at 16 (covering claims "in connection with the business or affairs of the Company or the activities of such Indemnified Party on behalf of the Company."). Plaintiff's defamation claim concerns whether his termination was pretextual. As this court recently explained, "part of plaintiff's defamation claim ... turns on whether, in the Fall of 2013, G2 learned the extent to which [plaintiff] had diverted IRS payroll taxes." *See Dkt. 343* at 2 (citations, quotation marks, and emphasis omitted). Plaintiff's alleged diversion of taxes relates to the business of the company. Relevant to this dispute is the question of when defendants became aware of the extent of the company's tax issues. *See id.* Thus, the defamation claim concerns the affairs of the company.

The court also rejects G2's argument that plaintiff's conduct vitiates his right to advancement. G2 has not pointed to any act taken by plaintiff that is without legal justification. For instance, while G2 complains about the multiple actions commenced by plaintiff and the fact that G2's advancement payments resulted in its default under the Settlement Agreement, G2 does not deny that plaintiff had the adjudicated legal right to such advancement and that he has the right under the Settlement Agreement to file a confession of judgment upon G2's default. G2 cites no authority for the proposition that the valid exercise of a legal right can qualify as "gross negligence, willful misconduct or material breach of the [FMV] Agreement" so as to implicate

the carve-out at the end of the advancement clause. *See* Dkt. 297 at 17. Actions in accord with a parties' contractual rights are not wrongful.

Whether plaintiff's actions are having an adverse impact on G2 is another matter. In that regard, notwithstanding plaintiff's right to further advancement and indemnification, the court is concerned that the amounts he seeks are disproportionate to the amount in controversy. Moreover, the fees sought should be reasonable. The briefs plaintiff submitted on this motion lack a clear, nonconclusory explanation of the amount of damages he claims to have suffered and seeks to recover. Without clarity on this issue, it is impossible for the court to determine how much advancement is reasonable. Before any further advancement is ordered, plaintiff must demonstrate, at the conference ordered below, how much he can reasonably expect to recover in this action. Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on his fourth and fifth causes of action is granted; and it is further

ORDERED that within one week of the entry of this order on NYSCEF, plaintiff shall file a letter, not to exceed two pages, in which he explains how much he seeks in damages in this action and provides a clear explanation of why such amounts are recoverable; and it is further

ORDERED that within one week thereafter, G2 may respond to plaintiff's letter with a letter of its own that also is not to exceed two pages; and it is further

ORDERED that the parties' letters will be addressed during a telephone conference on May 3, 2018, at 3:30 pm.

Dated: April 11, 2018

ENTER:



J.S.C.
SHIRLEY WERNER KORNEIC
J.S.C.