

Ja Kao v Onyx Renewable Partners L.P.

2022 NY Slip Op 33117(U)

September 15, 2022

Supreme Court, New York County

Docket Number: Index No. 654411/2021

Judge: Margaret Chan

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This opinion is uncorrected and not selected for official publication.

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

-----X
 JA KAO,

Plaintiff,

- v -

ONYX RENEWABLE PARTNERS L.P., ORP JOINT
 HOLDINGS GP LLC, BLACK ONYX INVESTMENTS, LLC,
 BILAL KHAN, JONATHAN MAXWELL

Defendants.
 -----X

INDEX NO. 654411/2021

MOTION DATE 02/03/2022

MOTION SEQ. NO. 005

**DECISION + ORDER ON
 MOTION**

HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 90, 93, 94, 95, 96, 97, 100, 101

were read on this motion to/for

ATTORNEY - FEES

Plaintiff moves, by order to show cause, for an order requiring defendant Onyx Renewable Partners, L.P. (Onyx) to (i) pay all legal fees and expenses of plaintiff incurred in connection with this dispute up until that date of the court's order, and on an ongoing basis, (ii) "advance" all fees and expenses to plaintiff within 10 business days of receiving demands and invoice summaries from counsel for plaintiff for such payments, and (iii) pay plaintiff's legal fees in connection with the order to show cause." Onyx opposes the motion.

Background

Plaintiff is the former president and chief executive officer (CEO) of Onyx, a limited partnership formed under the laws of Delaware, with its principal place of business in New York City. On July 1, 2015, plaintiff and Onyx entered into an Employment Agreement containing a fee shifting provision which is at issue on this motion.

In this action, plaintiff asserts claims for, *inter alia*, breach of various provisions of the Employment Agreement, discrimination and retaliation (NYSCEF # 1). Of relevance to this motion, the fourth cause of action seeks a declaratory judgment that Onyx is responsible for paying plaintiff's accrued and future legal expenses under section 22 of the Employment Agreement, while the sixth cause of action seeks damages for breach of section 22 based on Onyx's failure to pay plaintiff's accrued attorneys' fees and expenses (*id.*, ¶¶ 86-91; ¶¶ 96-100).

Onyx and defendant ORP Joint Holdings GP (ORP), which is Onyx's general partner, and defendant Black Onyx Investments, LLC (Black Onyx), which is one of Onyx's three limited partners (together, the Corporate Defendants) filed an answer in which they asserted counterclaims for the breach of fiduciary duty, and for a declaration that under the implied covenant of good faith and fair dealing and the common law, section 22 does not apply to unreasonable legal fees and expenses incurred by plaintiff in bad faith (NYSCEF # 21-Corporate Defendants' Answer, ¶¶ 53, 63). The Corporate Defendants subsequently amended their answer to add counterclaims for aiding and abetting breach of fiduciary duty, and for a declaration that Onyx does not have an obligation to pay plaintiff's legal fees and expenses relating to her causes of action for discrimination and retaliation or to the counterclaims (NYSCEF # 51-Corporate Defendants' Verified and Amended Counterclaims, ¶¶ 76-100).

By Decision and Order dated July 15, 2022, this court granted plaintiff's motion to dismiss the Corporate Defendants' counterclaims except for the counterclaim for breach of fiduciary duty (NYSCEF # 144). Notably, however, the court did not reach the merits of the two counterclaims seeking declaratory relief regarding section 22 of the Employment Agreement which counterclaims were dismissed solely on the ground that they were as duplicative of plaintiff's claims for relief under section 22 (*id.* at 8-9).

Section 22 of the Employment Agreement titled "Litigation; Legal Fees" provides that:

The parties acknowledge and agree in connection with any dispute, [sic] any of this agreement, the Partnership Agreement or the MLP LLC Agreement,¹ [Onyx] shall pay all costs and expenses of the parties to this Agreement, including without limitation, all legal fees and expenses of [plaintiff].

(NYSCEF # 81-Employment Agreement, § 22).

Plaintiff argues that she is entitled to immediate payment under the terms of section 22. In support of this argument, plaintiff avers that:

Section 22 of the Employment Agreement provides that in connection with any dispute arising out of my Employment Agreement, the Partnership Agreement the MLP LLC Agreement, Onyx shall pay all of my legal fees and expenses [and that] I insisted on this provision, because knowing the deep pockets of Blackstone, which funded Onyx,

¹ The MLP LLC Agreement is defined to be the Black Onyx LLC Agreement, which according to plaintiff is the interest management carry vehicle in which plaintiff and other select employees hold membership interest (NYSCEF # 87-Pl. Memo at 6, n.4).

this was the only way to provide a level playing field if a dispute were to arise with respect to my employment or my rights under the Onyx limited partnership agreement or the management carry equity I was promised to receive [.]

(NYSCEF # 78-Plaintiff's Aff, ¶¶ 11, 12).

Plaintiff further argues that under the broad terms of section 22, Onyx must advance all attorney's fees and costs incurred by her in connection with this action, including those related to her prosecution of her claims for discrimination and retaliation which she asserts are "inextricably intertwined with her other claims" and her defense of the amended counterclaims, and that it would be "infeasible and unduly burdensome" to distinguish among claims (NYSCEF #87-Plaintiff Mem of Law at 7-9).

Onyx opposes the motion, asserting that plaintiff is not entitled to a preliminary injunction as she has not established a likelihood of success on the merits, irreparable harm and that the equities weigh in her favor. As for its argument that plaintiff has failed to show likelihood of success on the merits, plaintiff asserts that the section 22 of the Employment Agreement does not provide for the advancement of attorneys' fees during the pendency of the litigation, and under applicable Delaware law, the absence of language regarding the advancement of attorneys' fees and expenses is dispositive. Onyx also argues that section 22 was intended to provide for payment of attorney's fees and expenses related only to contractual claims and thus does not apply to plaintiff's discrimination and retaliation claims, or to Onyx's counterclaim for breach of fiduciary duty. Moreover, Onyx maintains that its obligation to pay attorney's fees and expenses arising out of the contractual claims is limited by implied duty of good faith and fair dealing and reasonableness.

Discussion

At the outset, the court notes that contrary to Onyx's arguments, plaintiff does not seek a preliminary injunctive which would require her to meet the three prerequisites for granting such relief. That said, however, for the reasons below, under applicable Delaware law,² section 22 of the Employment Agreement cannot

² Delaware law applies based on the choice of law clause in section 17 of Employment Agreement, which provides, in relevant part, that:

BECAUSE OF THE VARIOUS STATES OF FORMATION OR RESIDENCY OF THE PARTIES HERETO, THE PARTIES ACKNOWLEDGE THAT THIS AGREEMENT IS GOVERNED BY AND IS TO BE CONSTRUED UNDER THE LAWS OF THE STATE OF DELAWARE

(NYSCEF # 81, §17 [emphasis in the original]).

654411/2021 KAO, JA LEE vs. ONYX RENEWABLE PARTNERS L.P. ET AL
Motion No. 005

Page 3 of 7

be interpreted to require defendant to pay plaintiff's attorney's fees during the pendency of this action.

“When interpreting a contract, the Court will give priority to the parties' intentions as reflected in the four corners of the agreement.” (*GMG Capital Investments, LLC v Athenian Venture Partners, I, L.P.*, 36 A3d 776, 779 [Del 2012] [internal citations and quotations omitted]). “Contract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language” (*id.* at 780 [internal citation and quotation omitted]). In this regard, “it is not the proper role of a court to rewrite or supply omitted provisions to a written agreement” (*Cincinnati SMSA Ltd. Partnership v Cincinnati Bell Cellular Sys. Co.*, 708 A2d 989, 992 [Del 1998] [internal citation omitted]). And, “[a] contract is not rendered ambiguous simply because the parties do not agree upon its proper construction... [instead]... an ambiguity exists [w]hen the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings (*Eagle Indus., Inc. v DeVibiss Health Care, Inc.*, 702 A2d 1228, 1232 [Del 1997]).

In accordance with these principles, section 22, which provides in relevant part that “[Onyx] shall pay all costs and expenses of the parties to this Agreement, including without limitation, all legal fees and expenses of [plaintiff],” cannot be interpreted to require Onyx to pay legal fees and expenses prior to the resolution of the action. In particular, absent from the section 22 is language such as the fees will be paid “in advance” or “as incurred” which would support a finding that Onyx must pay the fees before the end of the litigation (*see Majowski v Am. Imaging Mgt. Services, LLC*, 913 A2d 572, 575, 578 [Del Ch 2006] [holding that plaintiff officer of defendant did not have a right to advancement of attorneys' fee under subject agreements which promised to indemnify and hold harmless defendant's officers but did not mention the word “advancement,” and noting the contrast with other agreements which clearly provide for the payment of plaintiff's “legal expenses as they are incurred”]; *cf. Martinez v. Regions Fin. Corp.*, 2009 WL 2413858, at *13–14 [Del. Ch. Aug. 6, 2009] [finding advancement rights where the agreement in question stated that “the Company agrees to pay *as incurred* ... all legal fees and expenses”][emphasis supplied]).

Moreover, the cases cited by plaintiff are not controlling here as the fee-shifting provisions in those cases expressly provide for advancement of attorney's fees (*see e.g. L Series, LLC v Holt*, 571 SW3d 864,873 [Tex. App. 2019] [finding that under Delaware law, terminated employee had a right to advancement of attorney's fees where subject provision allowed for indemnification of employee “in advance of the final disposition of the proceeding....”]; *DeLucca v KKAT Mgt., L.L.C.*, 2006 WL

224058, at *7 [Del Ch Jan. 23, 2006] [“In the event that any Indemnified Person becomes involved in any capacity in any action, proceeding or investigation in connection with any matter that may result in the indemnification contemplated above, the Company will periodically advance to or reimburse such Indemnified Person for its legal and other expenses.”]). And, contrary to plaintiff’s argument, an intent by Onyx to pay plaintiff her attorney’s fees on an ongoing basis cannot be implied from the use of the word “pay” as opposed to “reimburse” or because the payment of plaintiff’s attorney’s fees is not conditioned on plaintiff being the prevailing party.

As for statements in plaintiff’s affidavit that section 22 was intended to create “a level playing field” given Blackstone’s wealth, such extrinsic evidence cannot be considered as section 22 is not ambiguous as to whether attorneys’ fees must be advanced (*Eagle* 702 A2d at 1232 [“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”]).

Plaintiff also argues that Onyx is obligated to pay plaintiff’s attorneys’ fees during the pendency of this action based on statements in both a May 21, 2021 letter from defendant Bilal Khan³ (NYSCEF # 83 at 1), on behalf of Onyx, and in a September 8, 2021 email from Onyx’s counsel agreeing to the pay certain of plaintiff’s attorney’s fees and expenses, and Onyx payment of plaintiff’s fees in accordance with the email (NYSCEF # 79-Hubell Aff., ¶¶ 7-10; NYSCEF #s 83, 84). This argument is unavailing since statements by Onyx agreeing to pay certain of plaintiff’s legal fees and Onyx’s payment of certain fees are ineffective to modify or amend the Employment Agreement, which provides that the “Agreement, together with any exhibits attached hereto, constitutes the entire understanding and agreement of the parties hereto regarding the employment of [plaintiff]” (NYSCEF # 81, § 20). Moreover, to the extent plaintiff argues that Onyx’s statements and its payment of fees and expenses constitute a waiver, such argument is also unavailing because the Employment Agreement provides that “[a]ny waiver, alteration, amendment, or modification of any of the terms of this Agreement shall be valid only if made in writing and signed by each of the parties hereto affected by such waiver, alteration, amendment, or modification” (*see generally Lennox Indus., Inc. v Alliance Compressors, LLC*, 2021 WL 4958254 at * 8 [Del Super Ct Oct 25, 2021]). Plaintiff has proffered no such writing.

The remaining issues concern the scope of section 22 under which the parties agreed that “in connection with any dispute, [sic] any of this agreement, the Partnership Agreement or the MLP LLC Agreement, [Onyx] shall pay all costs and expenses of the parties to this Agreement, including without limitation, all legal fees and expenses of [plaintiff].” While plaintiff argues that the provision requires

³ Mr. Bilal Khan is the former Chairman of Onyx’s Board of Directors and an employee non-party Blackstone Group, which is affiliated with Onyx.

defendant to pay all attorneys' fees and expenses incurred by plaintiff in connection with this litigation, the Corporate Defendants assert that the provision is limited to attorney's fees and expenses incurred by the parties to the Employment Agreement in disputes related to the agreements referred to in the provision.

In support of her position that the section should be broadly construed to include any fees and expenses incurred in connection with this action, plaintiff cites *Lillis v AT&T Corp.* (904 A2d 325, 332 [Del Ch 2006]), which addresses the plaintiff executive's right to recover attorney's fees under a fee-shifting provision. In *Lillis*, the court held that the defendants were required to pay all of the executive's attorneys' fees in any dispute "plausibly related to the agreement," which included those incurred in prosecuting plaintiff's claims (*id.*, at 332). However, the holding in *Lillis* is not controlling here since the relevant provision in that case, unlike the fee-shifting provision at issue, not only provides for the recovery of attorney's fee and expenses "in connection with" the relevant agreement but specified that the recoverable fees and expenses included "any incurred in contesting or disputing any [t]ermination or in seeking to obtain or enforce any right or benefit provided by this Agreement...." (*id.*, at 329).

Thus, while Onyx's obligation to pay attorney's fees and expenses under section 22 "in connection with any dispute" must be broadly construed (*Lillis*, at 331 [describing the phrase "in connection with" as "paradigmatically broad"]), the court finds that such obligation is limited by the reference to the three agreements and the phrase that the obligation only extends to the parties to the Employment Agreement (i.e. Onyx and plaintiff). Accordingly, the scope of Onyx's obligation to pay attorney's fees and expenses is limited to any dispute relating to the Employment and other agreement referenced in section 22. Thus, Onyx is not obligated to pay attorney's fees and expenses incurred by plaintiff in pursuing the discrimination and retaliation claims as these claims are not disputes related to the agreements but, instead, arise from alleged violations of New York State Human Rights Law and New York City Human Rights Laws.

As to Onyx's obligation to pay attorney's and expenses incurred in connection with the counterclaim for plaintiff's alleged breach of her fiduciary duties, the court reaches a different conclusion since this counterclaim relates to the Employment Agreement and the MLP LLC Agreement (referred to in the counterclaim as the Black Onyx LLC agreement). Specifically, the counterclaim alleges that plaintiff breached her fiduciary duty by, *inter alia*, retaining legal counsel with respect to the Employment Agreement from Onyx's General Counsel, and as a result was a "Bad Leaver" as the term is defined under the Third Amended and Restated Limited Liability Agreement of Black Onyx (NYSCEF # 51, ¶¶ 78, 79).⁴

⁴ The court notes that Onyx is also obligated to pay plaintiff's attorney's fees and expenses incurred in connection with the now dismissed counterclaims seeking declarations under section 22 of the Employment Agreement.

Next, contrary to plaintiff's apparent argument, the language of section 22 does not eliminate a requirement of Delaware law that attorneys' fees sought based on a contractual provision be reasonable and incurred in good faith (*SIGA Tech., Inc. v PharmAthene, Inc.*, 67 A3d 330, 353 [Del 2013] [internal citation and quotation omitted] ["Delaware law dictates that, in fee shifting cases, a judge determines whether the fees requested are reasonable"]; *Martinez*, 2009 WL at *14 [right to recover attorneys' fees under provision in employment agreement is limited by the implied covenant of good faith and fair dealing]). Here, although the parties dispute the reasonableness of the fees sought, including whether the summaries provided by plaintiff to Onyx are sufficient, as it has been found that Onyx is not required to pay plaintiff's attorney's fees and expenses during the pendency of the action, it is premature to determine the reasonableness of the fees.

Finally, while plaintiff is potentially entitled to "fees on fees," because Onyx is not required to pay the fees in advance, plaintiff's request for the attorney's fees and expenses incurred in connection with this order to show cause is denied without prejudice to renewal upon conclusion of this litigation (*see generally, Mahani v Edix Media Group*, 935 A2d 242 [Del 2007]).

Conclusion

In view of the above, it is

ORDERED that plaintiff's motion is denied.

This constitutes the Decision and Order of the court.

<u>9/15/2022</u> DATE	 MARGARET CHAN, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE