SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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HOYT DAVID MORGAN,

Plaintiff,

- against -

WORLDVIEW ENTERTAINMENT HOLDINGS, INC., WORLDVIEW ENTERTAINMENT HOLDINGS, LLC, WORLDVIEW ENTERTAINMENT PARTNERS VII, LLC, MOLLY CONNERS, MARIA CESTONE, and SARAH JOHNSON,

Defendants.

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Index No. 652323/2014

DECISION and ORDER

Mot. Seq. 11

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WORLDVIEW ENTERTAINMENT HOLDINGS, INC.; WORLDVIEW ENTERTAINMENT HOLDINGS; LLC; WORLDVIEW ENTERTAINMENT PARTNERS VII, LLC; and MOLLY CONNERS,

Third-Party Plaintiffs,

-against-

GOETZ FITZPATRICK LLP, AARON BOYAJIAN, ESQ., and CHRISTOPHER WOODROW,

Third-Party Defendants.

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Index No. 595472/2016

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MARIA CESTONE,

Second Third-Party Plaintiff,

-against-

GOETZ FITZPATRICK LLP, AARON BOYAJIAN, ESQ., and CHRISTOPHER WOODROW,

Second Third-Party Defendants.

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Index No. 595475/2016

HON. EILEEN A. RAKOWER, J.S.C.

Defendants, Goetz Fitzpatrick LLP ("GF law firm") and Aaron Boyajian ("Boyajian") (collectively, the "Goetz Third-Party Defendants"), move pursuant to CPLR §3211(a)(7) and (a)(1) to dismiss the Third-Party Complaint filed by third-party plaintiffs Worldview Entertainment Holdings, Inc. ("Worldview Inc."), Worldview Entertainment Holdings, LLC ("Holdings LLC"), Worldview Entertainment Partners VII, LLC ("Partners VII")(collectively, "Worldview Defendants"), and Molly Conners ("Conners")("Worldview Defendants" together with "Conners" shall be referred to as "Third-Party Plaintiffs") and the Second Third-Party Complaint filed by Maria Cestone ("Cestone"). The Goetz Third-Party Defendants submit the attorney affirmation of A. Michael Furman; the pleadings; bylaws of Worldview Inc.; affidavit of Boyajian; and copies of emails. Third-Party Plaintiffs and Cestone oppose the motions to dismiss.

Procedural History

A. First Party Action

Hoyt David Morgan ("Morgan") commenced the first party action on July 28, 2014. The first party action arose from an alleged breach of an agreement entered between Morgan and Worldview Inc., on June 20, 2013 ("the Separation Agreement"). The Separation Agreement identified the obligors of its terms as "Worldview Entertainment Holdings, Inc., its parents, successors, predecessors, divisions, affiliates, and assigns."

In the first party action, Morgan claimed that Worldview Inc. breached the terms of the Separation Agreement by failing to pay him for his non-recouped equity investments and provide him with Executive Producer credits on among other films, the film *Birdman*. Morgan also alleged that Holdings LLC, Partners VII, Conners, Cestone, and Sarah Johnson were jointly and severally liable to him for the alleged breach of the Separation Agreement as "affiliates" of Worldview, Inc. Specifically, Holdings LLC was alleged to "own 100% of the equity of Worldview Inc. and thus is its parent and affiliate." Partners VII was alleged to be "a division and affiliate of Worldview Inc., being the investment vehicle specifically associated with the Worldview Inc. film *Birdman*." Conners was alleged to be "an affiliate of Worldview Inc., as she owns a significant equity interest in Holdings, LLC, which in turn owns and controls Worldview Inc., and she controls Worldview Inc. as its Chief Executive Officer." Cestone was alleged to be "an affiliate of Worldview Inc.,

as she owns a significant equity interest in Holdings LLC, which in turn owns and controls Worldview Inc., and she controls Worldview Inc. as its co-founder and board member."

Defendants Holdings LLC, Partners VII, Conners, Cestone, and Johnson previously moved the Court to dismiss Morgan's claims against them. They argued that they were not parties to the Separation Agreement and did not fall into the definition of "affiliates." This Court denied their motions. The Appellate Division dismissed the tortious interference with contract claims as against the individual defendants, and otherwise affirmed the decision by order dated July 21, 2016. [1]

On December 14, 2016, the parties in the first party action filed a Stipulation of Discontinuance with Prejudice wherein Morgan's claims against all named defendants were discontinued with prejudice. The Stipulation of Discontinuance does not "discontinue any third-party claims asserted by: Worldview Entertaining Holdings, Inc., Worldview Entertainment Holdings LLC, Worldview Entertainment Partners VII LLC and Molly Conners in the third-party action bearing Index No. 595472/2016; and (ii) Maria Cestone in the second third-party action bearing Index No. 595475/2016."

B. Third-Party Action and Second Third-Party Action

On June 15, 2016, third-party plaintiffs Worldview Inc., Worldview Holdings, Partners VII, and Conners (collectively, "Third-Party Plaintiffs") filed a Third-Party Complaint naming Boyajian, GF law firm, and Woodrow as third party defendants. The Third-Party Plaintiffs asserted claims for legal malpractice, breach of fiduciary duty, and common law indemnity against Goetz Third-Party Defendants. The claims are based on allegations that Boyajian did not confirm that Worldview Inc.'s Board of Directors authorized or approved Woodrow to enter into the Separation Agreement on Worldview Inc.'s behalf and drafted the Separation Agreement such

[1] By Order entered on January 30, 2015, the Appellate Division held, "The term 'affiliates' is not defined within the agreement, and neither its meaning, nor whether the parties intended for the individual defendants to be bound under the agreement, and neither its meaning, nor whether the parties intended for the individual defendants to be bound under the agreement, can be discerned on this pre-answer to dismiss."

that the Holdings LLC, Partners VII, Conners and Cestone may be deemed to obligors to Morgan as "affiliates" of Worldview Inc.

On June 16, 2016, Cestone filed a second Third-Party Complaint against Boyajian, the GF Firm, and Woodrow. Cestone alleges to be the chairperson of the Board of Directors of Worldview Inc. Cestone asserts claims for legal malpractice, breach of fiduciary duty, and common law indemnity against the Goetz Third-Party Defendants based on the allegations that Boyajian failed to confirm whether Worldview Inc.'s Board of Directors approved or otherwise authorized the Agreement and advise her and/or the Board regarding the terms of the Separation Agreement. Cestone seeks as damages the full amount of any liability imposed upon her in the first party action.

Legal Discussion

CPLR § 3211 provides, in relevant part, that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . (1) a defense is founded upon documentary evidence . . . or (7) the pleading fails to state a cause of action[.]" CPLR § 3211(a)(1), (7).

On a motion to dismiss pursuant to CPLR § 3211(a)(1), "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) [internal citations omitted]). A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) [citations omitted]). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]).

On a CPLR § 3211(a)(7) motion to dismiss, the complaint is given a liberal construction; the court will accept the allegations as true and provide plaintiffs with the benefit of every favorable inference. (*Roni LLC v. Arfa*, 18 N.Y.3d 846, 848 [2011]; *People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 A.D.2d 91 [1st Dept. 2003] ["The court must accept the facts alleged as true . . . and determine simply whether the facts alleged fit within any cognizable legal theory."]). The question of "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 [2005]).

Third-Party Plaintiffs allege that "[t]he bylaws of Worldview Inc. require that compensation provided to an officer of the corporation be fixed by its Board of Directors ... or by the Chairman of the Board or the Chief Executive Officer ('CEO') acting under authority expressly delegated to such person by the Board of Directors." They allege that "the Board of Directors did not give Woodrow authority to pay Morgan any additional compensation in connection with Worldview Inc.'s termination of Morgan's employment" and "did not approve or authorize the Agreement at any time."

Third-Party Plaintiffs allege that the Goetz Third-Party Defendants breached the attorney-client duty and/or a fiduciary duty that they owed to them by "(i) failing to confirm whether the Board of Directors had approved or otherwise authorized Woodrow to enter into the Agreement; and (ii) violating the standard of care by negligently preparing the Agreement so as to allegedly make each of Holdings LLC, Partners VII and Conners an obligor under the Agreement, thereby potentially subjecting each of them to obligations that they were not otherwise required to undertake." They allege that as a result of Goetz Third-Party Defendants' breach, they have "(i) incurred and will continue to incur legal fees and expenses in connection with the defense of Morgan's claims in this action; and (ii) may be subjected to liability to Morgan if it is determined that they are "affiliates" of Worldview Inc. and/or obligors under the Agreement." They seek reimbursement of "(i) all of their legal fees and expenses incurred in connection with the defense of Morgan's claims in this action; and (ii) any and all liabilities imposed upon any of the Third-Party Plaintiffs to Morgan as a result of any determination that they are 'affiliates' of Worldview Inc. and/or obligors under the Agreement."

Similarly, Cestone alleges in her second Third Party complaint that the Goetz Third-Party Defendants "breached their attorney-client duty to Cestone by failing to confirm whether the Board of Directors had approved or otherwise authorized Woodrow" to enter into the Separation Agreement. Cestone also alleges that Goetz Third-Party Defendants "also violated the standard of care by failing to give advice to Cestone regarding" the Separation Agreement and "by negligently preparing the Agreement so as to allegedly make Cestone an obligor under the Agreement, exposing Cestone to obligations that she would not otherwise be required to undertake."

Through the affidavit of Boyajian, the Goetz Third-Party Defendants claim that Boyajian followed the instructions of Woodrow, who was Worldview Inc.'s then CEO, in memorializing the terms of the Separation Agreement, and Woodrow

had the authority to enter into the agreement under Article 4, Section 2 of Worldview Inc.'s by-laws. Article 4, Section 2, of the By-Laws states:

> Subject to the provisions of these bylaws and to the direction of the board of directors, *the President and Chief Executive Officer shall be responsible for the general management and control of the business and affairs of the corporation and shall perform all duties and have all powers that are commonly incident to the office of President or Chief Executive Officer* or as are delegated to the President and Chief Executive Officer by the board of directors. *The President and Chief Executive Officer shall have power to sign all authorized stock certificates, contracts, and other instruments of the corporation and shall have general supervision and direction of all of the other officers, employees and agents of the corporation.*

(Bylaws, Article 4, Section 2 at pp.14-15) (emphasis added).

In his affidavit, Boyajian states that he "did not have any reason to doubt Woodrow's authority as CEO of WVE [Worldview Entertainment] Inc. to negotiate and make binding decisions relating to WVE Inc. regarding the terms of the termination of a WVE Inc. employee." Boyajian states, "As such, I did not have any good faith basis not to follow the instructions of the highest executive officer of WVE Inc., namely, CEO Woodrow."

The Goetz Third-Party Defendants argue that based on Article 4, Section 2, of Worldview Inc.'s bylaws, Woodrow was authorized to hire and terminate employees of the corporation and to sign contracts that would be binding on the corporation. They argue that the third-party allegations that board approval was required for the Separation Agreement is based on an inaccurate interpretation of Article 4, Section 10 of the Bylaws, which only states that "the compensation of all officers of the corporation shall be fixed by the board of directors." They argue that the Third-Party Plaintiffs fail to explain how the Separation Agreement constitutes compensation that would trigger Article IV, Section 10 of the Bylaws.

The Goetz Third-Party Defendants further argue that even if the Court were to accept Third Party Plaintiffs' allegations that Woodrow's acts with respect to the Separation Agreement were not authorized, Worldview Inc. should bear the risk of any loss arising from Woodrow, their then CEO, because they appointed him to act on its behalf.

Legal Malpractice Claim

Claim I of the Third Party Complaint and Count I of the Second Third Party Complaint alleges legal malpractice/negligence against the Goetz Third-Party Defendants.

"To sustain a cause of action for legal malpractice, moreover, a party must show that an attorney failed to exercise the reasonable skill and knowledge commonly possessed by a member of the legal profession." (*Darby & Darby v. VIS Int'l*, 95 N.Y. 3d 308, 313 [2000]). In order to establish a legal malpractice claim against an attorney, a plaintiff must first prove that the attorney was negligent, that such negligence was the proximate cause of the loss sustained, and that actual damages resulted. (*see Tydings v. Greenfield, Stein & Senior*, 2007 NY Slip Op 6734, *2 [1st Dept. 2007]).

"There is a general presumption that the president of a corporation is clothed with the powers which, of necessity, inhere in the position of chief executive." (*Odell v. 704 Broadway Condo.*, 284 A.D.2d 52, 56-57 [1st Dept 2001]). "The president or other general officer of a corporation has power, prima facie, to do any act which the directors could authorize or ratify. ... The true test of his authority to bind the corporation is ... whether, at the time, he is engaged in the discharge of the general duties of his office, and in the business of the corporation." (*Id.* at 57).

"The rule is well settled that it will ordinarily be presumed that a president of a corporation has the power to make contracts pertaining to the business of the corporation and coming within the apparent scope of his authority." (*Odell*, 284 A.D.2d at 57). "A president's apparent authority exists regardless of whether the president has actual authority to carry out such acts." (*Id.* at 57). "Furthermore, a president of a corporation has apparent authority to act within the general scope of his office and such acts are binding on the corporation against one who does not know of any limitation or the president's true authority." (*Id.*).

Third-party Plaintiffs and Cestone allege that Boyajian acted negligently by failing to confirm whether the Board of Directors had approved or otherwise authorized Woodrow to enter into the Separation Agreement. A legal malpractice action is barred if the client negotiated and structured the transaction, and the attorney was merely retained to memorialize it. (*See Coastal Broadway Associates*

v Raphael, 298 A.D. 2d 186 [1st Dept 2002]). Here, Boyajian drafted the Separation Agreement at the direction of Woodrow, the CEO of Worldview Inc. Paragraph 35 of the Third-Party Complaint alleges, "Upon information and belief, Woodrow, both personally and *through his direction of the Goetz Third-Party Defendants*, negotiated and prepared the Agreement with Morgan." (emphasis added). There are no allegations that if true, would show that Boyajian had any reason to question Woodrow's authority to bind Worldview Inc., as its CEO. Woodrow was in fact the signatory on Morgan's initial March 1, 2013 employment agreement with Worldview Inc. Furthermore, the By-laws of Worldview Inc. state that the CEO is "responsible for the general management and control of the business and affairs of the corporation and shall perform all duties and have all powers that are commonly incident to the office of President or Chief Executive Officer," has the "power to sign," among other things, contracts, and to supervise and direct "all of the other officers, employees and agents of the corporation."

Third-party Plaintiffs and Cestone also allege that Boyajian acted negligently by drafting the Separation Agreement because it contained the language identifying its obligors as "Woodrow, its parents, successors, predecessors, divisions, affiliates and assigns." Third-party Plaintiffs and Cestone fail to allege facts to substantiate how the inclusion of this provision is a deviation from the standard of care or negligent. While Third-Party Plaintiffs and Cestone argue that the provision may make them bound as obligors of the terms of the Separation Agreement, nowhere in the agreement does it specifically reference these parties or state that they are obligors. In fact, the Appellate Division January 30, 2015 decision stated, "The term 'affiliates' is not defined within the agreement, and neither its meaning, nor whether the parties intended for the individual defendants to be bound under the agreement, and neither its meaning, nor whether the parties intended for the individual defendants to be bound under the agreement, can be discerned on this pre-answer to dismiss."

Here, the mere use of the word "affiliate" in the Separation Agreement does not constitute negligence on Third-Party Defendants' behalf – where at the time of making of the Separation Agreement – there was no apparent conflict between Worldview Inc. and the "affiliates" nor any allegation of such a conflict.

Other Claims:

Claim II of the Third-Party Complaint and Count II of the Second Third-Party Complaint alleges breach of fiduciary duty against the Goetz Third-Party Defendants. The elements of a cause of action for breach of fiduciary duty include

(1) the existence of a fiduciary relationship; (2) misconduct; and (3) damages caused by the misconduct. (*Armentano v. Paraco Gas Corp.*, 90 A.D. 3d 683 [2nd Dept 2011]). A claim for breach of fiduciary duty "premised on the same facts and seeking the identical relief in the legal malpractice cause of action is redundant and should be dismissed." (*Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267, 271 [1st Dept 2004]). Here, Third-Party Plaintiffs and Second Third-Party Plaintiff's claims for breach of fiduciary duty all arise from the same factual allegations as the legal malpractice claim and assert the exact same damages as those pled in support of the legal malpractice claim, i.e. all sums of money ordered to be paid to Morgan together with interest and attorney's fees.

Claim V of the Third Party Complaint and Count III of the Second Third Party Complaint alleges common law indemnity against the Goetz Third Party Defendants. It alleges that "[i]f Morgan was damaged and injured as alleged in the Complaint, which the Third-Party Defendants deny, then those damages and injuries, if any, were caused solely by the Third-Party Defendants' negligence and breaches of their duties." It further alleges that "[t]he Third-Party Plaintiffs did not participate in any way in the Third-Party Defendants' negligence and breaches of their duties," and therefore they "the Third-Party Plaintiffs are entitled to be indemnified in full by the Third-Party Defendants for any and all liabilities imposed upon them as a result of Morgan's claims against them."

"A party's right to indemnification may arise from a contract or may be implied 'based upon the law's notion of what is fair and proper as between the parties." (*McCarthy v. Turner Const., Inc.*, 17 N.Y.3d 369, 374-75 [2011]). "Implied [or common-law] indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other." (*Id.*). "Common-law indemnification is generally available 'in favor of one who is held responsible solely by operation of law because of his relation to the actual wrongdoer." (*Id.*). "Consistent with the equitable underpinnings of common-law indemnification, our case law imposes indemnification obligations upon those actively at fault in bringing about the injury, and thus reflects an inherent fairness as to which party should be held liable for indemnity." (*Id.*).

Since the Third Party Plaintiffs and Cestone fail to plead any theory of liability or culpable fault against the Goetz Third-Party Defendants that would a warrant a shift of loss to them, the cause of action for indemnification fails to state a claim.

Wherefore, it is hereby

ORDERED that third-party defendants Goetz Fitzpatrick LLP and Aaron Boyajian's motion to dismiss the Third-Party Complaint filed by third-party plaintiffs Worldview Entertainment Holdings, Inc., Worldview Entertainment Holdings, LLC, Worldview Entertainment Partners VII, LLC, and Molly Conners is granted; and it is further

ORDERED that the Third-Party Complaint filed by third-party plaintiffs Worldview Entertainment Holdings, Inc., Worldview Entertainment Holdings, LLC, Worldview Entertainment Partners VII, LLC, and Molly Conners is dismissed as against defendants Goetz Fitzpatrick LLP and Aaron Boyajian, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that third-party defendants Goetz Fitzpatrick LLP and Aaron Boyajian's motion to dismiss the Second Third-Party Complaint filed by second third-party defendant Maria Cestone is granted; and it is further

ORDERED that the Second Third-Party Complaint filed by Maria Cestone against defendants Goetz Fitzpatrick LLP and Aaron Boyajian is granted, and the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court. All other requested relief is denied.

Dated: JULY 27, 2017

HON. EILEEN A. RAKOWER J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION