SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

----------X

LIVE INVEST, INC.,

Plaintiff,

-against-

JERICHO CAPITAL CORP.,

Defendant.

----------X

JERICHO CAPITAL CORP.,

Third-Party Plaintiff,

-against-

GAMMA ENTERPRISES, LLC, d/b/a GAMMA LABS,

Third-Party Defendant.

----------X

Index No. 605639/2015

Hon. E.H. Emerson
IAS Part 44

Motion # 009

DEFENDANT GAMMA ENTERPRISES, LLC's MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS JERICHO CAPITAL CORP.'S THIRD-PARTY COMPLAINT

LAX & NEVILLE LLP

Barry R. Lax, Esq.
Robert R. Miller, Esq.
1450 Broadway, 35th Floor
New York, NY 10018
Tel: (212) 696-1999

Attorneys for Defendant Gamma Enterprises, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Defendant Gamma Enterprises, LLC respectfully submits this memorandum of law in support of its motion, pursuant to Sections 3211(a)(1), (a)(2), and (a)(7) of the New York Civil Practice Law and Rules, to dismiss the Jericho Capital Corp.'s Third-Party Complaint.

PRELIMINARY STATEMENT

On January 13, 2017, this Court dismissed Plaintiff Live Invest, Inc.'s veil-piercing claim against Gamma, the minority member of Delta Direct Marketing, LLC, finding that it had "failed to plead any particularized facts to substantiate its conclusory allegations, which are upon information and belief, that Delta was dominated and controlled by Morgan, Gamma, and Alpha." (Doc 121, 2). The Court simultaneously denied Jericho's motion to dismiss and found there was sufficient basis for Live Invest's "allegations that Delta was dominated and controlled by Jericho..." (Doc 120, 3). Live Invest's claim for abuse of the corporate form is the only potential basis of liability asserted against any of the original Defendants. The Court found Live Invest had failed, again, to plead it against Gamma and so dismissed Gamma from the case; the Court found Live Invest had managed, narrowly, to plead it against Jericho and so allowed the case to proceed against Jericho.

Jericho's indemnity claims, then, whether contractual or implied, are predicated upon its putative liability for either "exercise[ing] complete domination over" Delta and using that domination to "commit a fraud or wrong against" Live Invest or "so dominat[ing]" Delta "that it primarily transact[ed]" Jericho's "business instead of its own and can be called" Jericho's "agent or alter ego." (Doc 120, 2). In other words, Jericho is seeking indemnification for liability it may have in the future for assuming complete control over the company of which it was the controlling shareholder and either subsuming the company entirely into its own interests and activities or using it to defraud a third-party.

There is no serious argument that this falls within the alleged indemnity agreement between Jericho and Gamma. If it did, the indemnity agreement would be void as a matter of law.

The Third-Party Complaint should be dismissed with prejudice.

I. STATEMENT OF FACTS[1]

A. PARTIES

1. Third-Party Plaintiff

Defendant Jericho Capital Corp. is, and at all times relevant hereto was, a corporation organized under the laws of the State of Nevada and authorized to do business in the State of New York, with its principal place of business located in Suffolk County. (Doc 125, ¶ 1).

2. Third-Party Defendant

Defendant Gamma Enterprises LLC is, and at all times relevant hereto was, a limited liability company organized and existing under the laws of the State of New York, with its principal place of business in the County of Suffolk. (*Id.* at ¶ 2).

B. PROCEDURAL BACKGROUND

On October 15, 2010, Live Invest and Delta Direct entered into two contracts for the sale of goods. After the failure of their joint venture, Live Invest filed a complaint for breach of contract and tortious interference on December 28, 2012. On July 17, 2014, default judgment was entered against Delta Direct. (Doc 125, ¶ 15).

On May 28, 2015, Live Invest filed a Complaint against Jericho, Gamma, Cliff Morgan, and Alpha seeking to pierce Delta Direct's corporate veil. (*Id.* at ¶ 16). After a series of motions

[1] This Statement of Facts is drawn from the allegations of the Amended Complaint, which, except where directly contradicted by documentary evidence submitted herewith, are accepted as true solely for the purposes of this motion, as well as from the undisputed documentary evidence annexed to the Miller Declaration submitted herewith, all of which may be considered by the Court on a motion to dismiss. *See* David D. Siegel, New York Practice § 277, at 475 (5th ed. 2011).

and dismissals not relevant here, (*See Id. at* ¶¶ 17-18), the Court granted Gamma, Alpha and Cliff Morgan's motion to dismiss the Amended Complaint on January 13, 2017, finding that "plaintiff has failed to plead any particularized facts to substantiate its conclusory allegations, which are upon information and belief, that Delta was dominated and controlled by Morgan, Gamma, and Alpha." (Doc 121, 2). On the same date, the Court denied Jericho's motion to dismiss, finding sufficient support for "plaintiff's allegations that Delta was dominated and controlled by Jericho..." (Doc 120, 3).

C. EQUITY OWNERSHIP PURCHASE AGREEMENT

On March 6, 2017, Jericho filed its Third-Party Complaint against Gamma asserting claims for contractual indemnity, common law indemnity and equitable indemnity and constructive trust. (Doc 125, ¶¶ 26-44). The contractual indemnity claim is based upon an Equity Ownership Purchase Agreement ("Agreement") (Doc. 126), allegedly entered into by Jericho and Gamma on December 31, 2011. (*Id.* at ¶ 10). The alleged indemnity clause is in Paragraph 1 of the Agreement:

> Buyer hereby agrees to indemnify and hold harmless Seller, and Seller's members, managers, officers, and directors and their respective heirs, executors and administrators from any against any and all manner of loss, suits, claims, demands, damages, debts, liabilities, obligations, costs, expenses, actions, or causes of action (including but not limited to, actual damages, punitive damages, fines and attorneys' fees and costs, whether or not litigation is commenced) arising out of, involving, or relating in any way to the operation of the Company from the date of its organization and continuing through and after the date of this Agreement.

(Doc 126, ¶ 1).

II. STANDARD OF REVIEW

"When a party moves to dismiss a complaint pursuant to CPLR § 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the

pleading has a cause of action." *Bokhour v. GTI Retail Holdings, Inc.*, 94 A.D.3d 682 (2nd Dept 2012); *See also Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977). "In considering such a motion, 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." *Sokol v. Leader*, 74 A.D.3d 1180, 1181 (2d Dept 2010) (internal quotation and citation omitted). The court "need not … accept as true legal conclusions or factual allegations that are either inherently incredible or flatly contradicted by documentary evidence." *1455 Washington Ave. Assocs. v. Rose & Kiernan, Inc.*, 260 A.D.2d 770, 771 (3d Dept 1999) (internal quotations marks omitted). Where the documentary evidence contradicts such allegations or conclusions such that a defendant may "definitively dispose of plaintiff's claim[s]," dismissal pursuant to C.P.L.R. § 3211(a)(1) is appropriate. *Pro Design, Inc. v. Greenacres Management, LLC*, 2011 WL 11074004 at *2 (N.Y.Sup. 2011). The operative contract is documentary evidence in a breach of contract case. *See Fontanetta v. Doe*, 73 A.D.3d 78, 85 (2d Dept 2010).

III. ARGUMENT

A. JERICHO'S CLAIMS MUST BE DISMISSED BECAUSE THEY ARE CONTRARY TO THE DOCUMENTARY EVIDENCE

"A party's right to contractual indemnification depends upon the specific language of the relevant contract … The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances." *Campisi v. Gambar Food Corp.*, 130 A.D.3d 854, 855 (2d Dept 2015) (internal citations omitted). "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." *Sherry v. Wal-Mart Stores East, L.P.*, 967 A.D.3d 992, 994 (2d Dept 2009).

Jericho's contractual indemnification claim is governed by Paragraph 1 of the Agreement, which unambiguously forecloses Jericho's contractual indemnification claim on three independently sufficient grounds: (1) It is unripe and presents the Court no case or controversy to resolve; (2) it does not indemnify Jericho for its own conduct; and (3) it is void as a matter of public policy to the extent that it purports to indemnify Jericho for its intentional acts.

1. JERICHO'S CLAIM FOR CONTRACTUAL INDEMNIFICATION IS PREMATURE AND MUST BE DISMISSED

Jericho is seeking "a Judgment … awarding Jericho judgment for any amounts or damages which **may be awarded** to Plaintiff Live Invest in the main action as against Jericho and/or all sums paid by Jericho to resolve Plaintiff's claim" and "all attorneys' fees, costs and expenses incurred by Jericho in connection with the claims of Plaintiff and enforcement of the subject indemnity agreement…" (Doc 125, ¶ (1); *see also Id.* at ¶¶ (2)-(3) (requesting substantively identical relief)) (emphasis added). Under New York law, an ordinary indemnitor's obligation does not arise unless and until there is a determination of liability on the merits in the underlying litigation:

> A claim resting on contingent future events that may occur as anticipated or may not occur at all, is not ripe for adjudication. The subject action is not justicable to the extent it seeks a declaration regarding defendant's obligation to defend and indemnify plaintiff with regard to potential, unfiled claims, and **seeks reimbursement for losses arising from the eight filed actions** and future, anticipated claims…
>
> ***
>
> Since, to date, **no liability has been imposed upon the plaintiff, those claims seeking indemnification are premature**. Moreover, defendant has no duty to defend against any actions that do not currently exist. Plaintiff's expectation of future actions is

> speculative, and does not give rise to an actual controversy. Accordingly, such claims for indemnification or defense of unfiled potential lawsuits are hereby dismissed without prejudice.

FSP, Inc. v. Societe Generale, 2003 WL 124515 at *4 (S.D.N.Y. 2003) (emphasis added). In *FSP*, as here, plaintiff sought indemnification of its attorneys' fees and costs and potential future damages on eight claims pending against it. The contract between the parties also imposed a duty to defend, which is not and cannot be alleged here. The court dismissed the indemnification claims for lack of subject matter jurisdiction,[2] holding that:

> The duties to defend and indemnify are legally distinct. Claims regarding a duty to defend against pending actions are generally justiciable. Claims concerning indemnification obligations, however, are not ripe for adjudication until liability has been imposed upon the party to be indemnified

Id. See, e.g., Altman v. Bayliss, 1997 WL 436711 at *2 (W.D.N.Y. 1997) (finding that "[i]nasmuch as there has been no liability determination, N & W's motion is premature and must be denied without prejudice" where the parties indemnification agreement provided for indemnification for "all loss, cost, expense, claim, fines, penalties, and liability (including but not limited to attorneys' fees) resulting from [a] personal injury to any person arising from or incident to D & T's performance of its services under the Agreement.") (internal quotation omitted).

Nowhere does Jericho allege either that Gamma Labs is an insurer or that it owes Jericho a duty of defense, nor does Section 1 even purport to impose a duty to defend upon Gamma Labs. As the contractual indemnity claim is unripe, it should be dismissed. If it is not dismissed, it should be stayed pending a determination on the merits of Jericho's liability, if any, on Live Invest's veil-piercing claim:

[2] The court also dismissed the claims for defense of lawsuits not yet filed.

> Moreover, since the third-party defendant is not an insurer, it was inappropriate to require the third-party defendant to provide a defense to the defendant third-party plaintiff in the main action since the obligation of the third-party defendant to indemnify the defendant third-party plaintiff has yet to be determined.

Brasch v. Yonkers Const. Co., 306 A.D.2d 508, 511 (2d Dept 2003).

2. THE AGREEMENT DOES NOT INDEMNIFY JERICHO FOR ITS OWN CONDUCT

In New York, "an indemnification agreement between sophisticated business entities will be construed as intending to indemnify either party for its own wrongdoing only when the language in the agreement clearly connotes an intent to provide for such indemnification." *Facilities Dev. Corp. v. Miletta*, 180 A.D.2d 97, 102 (3d Dept 1992). Paragraph 1 does not "clearly connote[] an intent" to indemnify Jericho for its own conduct in any form:

> Buyer hereby agrees to indemnify and hold harmless Seller, and Seller's members, managers, officers, and directors and their respective heirs, executors and administrators from any against any and all manner of loss, suits, claims … arising out of, involving, or relating in any way to the **operation of the Company**…

(Doc 126, ¶ 1) (emphasis added). There is no reference to Jericho or Jericho's conduct in this provision, which clearly and exclusively concerns the "operation of the Company," language that does not encompass Jericho's own conduct as a matter of law. *See, e.g., Facilities Dev. Corp. v. Miletta*, 180 A.D.2d 97, 102 (3d Dept 1992) (holding that indemnification "'from suits, actions, damages and costs of every nature and description resulting from **the work under this [c]ontract**'" did not "clearly connote an intent to provide for the indemnification of plaintiff's representative for damages caused by the representative's own tortious conduct and/or breach of contract.") (emphasis added).

To the extent the contractual language bears on Jericho's conduct at all, it is to the contrary:

> Buyer acknowledges that neither Seller nor any member or representative of Seller has ever been a manager of the Company and that Buyer or Buyer's designee is and has been the sole manager of the Company.

(*Id.*). As well as providing no express or "clear" indemnity of Jericho's own conduct, this language forecloses Jericho's implied indemnity claims. The parties could not possibly have intended that Gamma Labs indemnify Jericho for Jericho's own conduct in the "operation of the Company" in the same paragraph in which Jericho disclaims any participation in the "operation of the Company."

Nor are Live Invest's claims against Jericho even colorably within the scope of the Agreement. The theory of Jericho's liability to Live Invest is abuse of the corporate form:

> The Plaintiff seeks to pierce Delta's corporate veil … Generally, piercing the corporate veil requires a showing that the owner (1) exercised complete domination over the corporation with respect to the transaction attacked and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury. The corporate veil will be pierced to achieve equity, even absent fraud, when a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's agent or alter ego.

(Doc 120, 2). If Jericho used Delta Direct to "commit a fraud or wrong against plaintiff which resulted in the plaintiff's injury," its putative liability is not indemnifiable; if Jericho "so dominated" Delta Direct that it primarily transacted Jericho's "business instead of its own and can be called" Jericho's "agent or alter ego," its putative liability is not "arising out of, involving, or relating in any way to the operation of the Company." In either case, Jericho's putative liability is predicated wholly upon its own conduct. All allegations of similar conduct against Gamma, meanwhile, have been dismissed.

Jericho is evidently aware of this problem:

> Jericho was a passive investor; it had no role in the running or operation of Delta.
>
> At all relevant times, Morgan was Delta's Manager and Managing Member, and had full authority to manage Delta's business without obtaining Jericho's consent or approval.
>
> Jericho did not direct, supervise or control Delta's operations, and did not cause the damages alleged by Plaintiff in the Amended Complaint. Delta was directed, supervised, controlled and operated by Gamma and/or Morgan and Gamma is responsible to indemnify Jericho in connection with the claim of Plaintiff Live Invest.

(Doc 125, ¶¶ 6-7, 37; *see also* ¶¶ 8-9, 42). These allegations are fundamentally incompatible with Jericho's indemnity claims: If Jericho is liable to Live Invest, rather than "no role" in Delta Direct it had "complete domination" and rather than sit back as "a passive investor" it used that "complete domination" either to commit a fraud or wrong or to transact its own business such that Delta Direct ceased to exist as an independent entity. If, on the other hand, Jericho is not liable to Live Invest, it is not owed indemnity.

Jericho's indemnity claims are fundamentally incompatible with the underlying veil-piercing claim. Veil-piercing by its very nature is predicated upon the intentional, and almost invariably wrongful, conduct of the individual or entity it reaches. The liability for the corporation's acts it imposes does not run vicariously from the putative indemnitor's conduct but, by necessity, directly from putative indemnitee's. For the same reason, Jericho's abuse of the corporate form is manifestly beyond the "language and purpose of the entire agreement and the surrounding circumstances" of the Agreement, and it is ludicrous to argue now that the parties intended to indemnify Jericho for it.

Jericho's contractual indemnity claim should be dismissed with prejudice.

3. TO THE EXTENT THAT THE AGREEMENT PURPORTS TO INDEMNIFY JERICHO FOR ITS INTENTIONAL ACTS, IT IS VOID AS AGAINST PUBLIC POLICY

The Agreement does not indemnify Jericho for its own conduct, let alone for its intentional acts. If, however, Paragraph 1 provided for indemnification of Jericho's own conduct and provided for indemnification of the intentional conduct at issue in this case, it would be void as a matter of law: "Indemnity is generally unavailable for intentional misconduct." *Friedman v. Hartmann*, 787 F. Supp. 411, 418 (S.D.N.Y. 1992); *see also Barbagallo v. Marcum LLP*, 2012 WL 1664238 at *4 (E.D.N.Y. 2012).

If Jericho is liable to Live Invest at all, it is necessarily because *Jericho* abused the corporate form. While "[g]enerally, piercing the corporate veil requires a showing that the owner (1) exercised complete domination over the corporation with respect to the transaction attacked and (2) that such domination was used to commit a fraud or wrong against the plaintiff," (Doc 120, 2), there is no theory of abuse of the corporate form that does not require intent, nor can Jericho have so dominated and controlled Delta Direct for its own purposes as to render Delta Direct its alter ego and remained within even the broadest reading of the Paragraph 1 of the Agreement.

Jericho's Third-Party Complaint should be dismissed with prejudice pursuant to CPLR §§ 3211(a)(1) and 3211(a)(7).

B. JERICHO'S IMPLIED INDEMNITY CLAIMS MUST BE DISMISSED

The foregoing applies equally to Jericho's tacked-on implied indemnity claims.[3] Further, "an indemnity cause of action can be sustained only if some duty to indemnify exists between

[3] Jericho has stated two separate causes of action, for "common law indemnification" and "equitable indemnification." (Doc 125, ¶¶ 34-44). These terms are interchangeable, both with

[the parties]." *Anderson v. Greyhound Lines, Inc.*, 2011 WL 3480945 at *4 (S.D.N.Y. 2011) (internal quotation and citation omitted). "This right to indemnification is extinguished if the party who seeks indemnification is partially at fault or responsible in any degree." *Monaghan v. SZS 33 Assoc. LP, Mathis v. United Homes, LLC,* 607 F.Supp.2d 411, 434 (E.D.N.Y.2009) (internal quotation and citation omitted).

Jericho has not alleged Gamma owed it a duty beyond the purported indemnity provision of the Agreement, and while it alleges again that it "did not direct, supervise or control Delta's operations," (Doc 125, ¶¶ 37, 42), it cannot possibly be found liable on Live Invest's veil-piercing claim unless it was "partially at fault or responsible in any degree" for Delta Direct's alleged conduct toward Live Invest. Implied indemnity is founded upon the solely vicarious liability of one party for the conduct of another. Here, Jericho's liability runs from Delta Direct's alleged conduct, not Gamma's, and could only be found on the basis of its own.

Implied indemnity cannot possibly be found in this case. *See, e.g, Taft v. Shaffer Trucking, Inc.*, 52 A.D.2d 255, 258 (4th Dept 1976) ("Nor has it validly stated a cause of action under the common-law theory of implied indemnity … [] if Crawford is found liable to plaintiffs on the basis of fraud and misrepresentation, its liability would be grounded in its own tortious conduct. Thus Crawford would be required to pay for its own wrong and not for any wrong or negligence on the part of plaintiffs' attorney."). Jericho's implied indemnity claims should be dismissed with prejudice pursuant to 3211(a)(7).

CONCLUSION

For the foregoing reasons, Gamma respectfully requests that the Court grant its motion to dismiss the Third-Party Complaint with prejudice.

---

one another and with implied indemnity. *See, e.g, Arch Ins. Co. v. Harleysville Worcester Ins. Co.*, 2014 WL 3377124 at *7 (S.D.N.Y. 2014).

Dated: New York, New York
May 2, 2017

LAX & NEVILLE LLP

By: ***/s/ Barry R. Lax***
Barry R. Lax, Esq.
Robert R. Miller, Esq.
1450 Broadway, 35th Floor
New York, NY 10018
Tel: (212) 696-1999

Attorneys for Defendant Gamma Enterprises, LLC