

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re :
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 : Chapter 7
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 LAWRENCE SLATER :
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 Debtor. : Case No. 03-16647(PCB)
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APPEARANCES:

HERZFELD & RUBIN, P.C.
Attorneys for the Debtor
40 Wall Street
New York, New York 10006
By: Peter J. Kurshan

PHILLIPS NIZER LLP
Attorneys for Neal Gersten and Gersten Slater
666 Fifth Avenue
New York, New York 10103
By: Helen Davis Chaitman

BRAUNER BARON ROSENZWEIG & KLEIN, LLP
Attorneys for Trustee
61 Broadway
New York, New York 10006
By: Alison C. Gilbert, Esq.

With copy to:
SIGMOND FOX, P.C.
Attorneys for Michael Adest & Company
1500 Broadway
New York, New York 10036
By: Sigmund Fox

BEATTY, PRUDENCE CARTER, U.S.B.J.

MEMORANDUM DECISION

Lawrence Slater (the “Debtor”) filed a petition under Chapter 7 of the former Bankruptcy Code on October 23, 2003. Neal Gersten (“Gersten”) and Gersten Slater & Co. (“Gersten Slater”) filed a timely proof of claim in the amount of \$170,993.78 (the “Claim”) on the grounds of contribution or joint liability seeking recovery based on their payment of a certain judgment. The Debtor has objected to the Claim and filed a motion for summary judgment to disallow the Claim. Gersten and Gersten Slater have opposed the motion.

For the reasons that follow, the Court grants the Debtor’s motion.

Statement of Facts

The Chapter 7 Trustee brought on a motion for approval of a settlement with the Debtor with respect to the Debtor’s rights in an accounting firm. Gersten and Gersten Slater objected to the settlement on the grounds that the amount to be received by the trustee was insufficient. The Debtor objected to their objection on the grounds that they were not parties in interest as the Claim was not allowable.

Since the determination of whether to approve the settlement turns on the weight, if any, the Court should give to the Gersten-Gersten Slater objection, the approval of the settlement has been put on hold while the Court determines the objection made by the Debtor to the Claim. Neither side asserts that a trial is required and the matter may thus be determined by way of summary judgment.

Gersten Slater was a professional corporation engaged in the practice of public accounting and tax and financial planning which had its office in New Jersey. The Debtor was formerly an officer, director and shareholder of Gersten Slater. The Debtor

was and is a resident of the State of New Jersey. Gersten was also formerly an officer, director and shareholder of Gersten Slater. Gersten was and is a resident of the State of New York. As a result of various disputes, the Debtor and Gersten decided to terminate the affairs of Gersten Slater. Unable to agree on the resolution of certain issues, the Debtor and Gersten went to arbitration, which resulted in the execution of a settlement agreement (the “Arbitration Settlement Agreement”) dated June 18, 1996.

The Arbitration Settlement Agreement provided, *inter alia*, for the distribution of the assets and liabilities of Gersten Slater between Gersten and Slater. Paragraph 7, the only paragraph material to this litigation reads:

Slater, Gersten, and Gersten, Slater & Co. shall exchange general releases, the forms of which are annexed hereto as Exhibits “B” and “C” which shall cover all business and relations between and among the parties including by way of example any and all claims of any kind by or arising out of Gersten, Slater & Co., against Slater and Gersten for any reason except for those rights and responsibilities set forth herein, and such releases shall further exclude any claims, *inter se*, for contribution or indemnity as a result of any professional negligence or malpractice claims made against Gersten, Slater & Co. to the extent the Business Corporation Law, or cases thereunder, does not limit or preclude such liability. Arbitration Settlement Agreement, paragraph 7.

The Arbitration Settlement Agreement provided for the Debtor’s resignation from Gersten Slater. It also provided that Gersten would remain as the sole shareholder and manage the business’ affairs. There is no choice of law provision in the Arbitration Settlement Agreement.

The separate release agreements, attached as Exhibit B and C, were executed as provided for in the Arbitration Settlement Agreement (“Individual Releases”). In the Individual Release received by the Debtor:

Gersten... as Releasor... releases and discharges the Releasee [the Debtor]... from all actions, causes of action, suits, debts...damages,

judgments...claims, and demands...which against the Releasee, the Releasor, Releasor's heirs, executors administrators, successors and assigns ever had, now have or hereafter can, shall or may, have for, upon, or by reason of any matter... from the beginning of the world to the day of the date of this release. Individual Releases, p.1.

There is no choice of law provision in the Individual Release.

The Claim is one for contribution arising out of litigation (the "Weiner Litigation") that had begun in 1993, in which Gersten, the Debtor and Gersten Slater, were co-defendants.¹ At no point in the Weiner Litigation did Gersten (or the Debtor for that matter) assert a cross-claim against the other for contribution or indemnity. The Weiner Litigation sought dissolution of a previous accounting partnership among the Weiner parties, the Debtor, Gersten and Gersten Slater as well as an accounting and various other relief. On May 23, 2003 judgment was entered in the Superior Court of New Jersey against the Debtor, Gersten and Gersten Slater holding them jointly and severally liable for breach of fiduciary duties, breach of contract, fraud, breach of the covenants of good faith and fair dealing, and misrepresentation. On appeal, the judgment of the Superior Court of New Jersey was affirmed as to Gersten and Gersten Slater.² Weiner v. Gersten Slater, Superior Court of New Jersey, Docket No. C-247-93, aff'd Superior Court of New Jersey Appellate Division, Docket No. A-4445-02T5 (2004). Gersten satisfied the judgment by payment of \$341,987.57 on March 30, 2005. The amount that Gersten and Gersten Slater seek in contribution from the Debtor is one half of that amount.

¹ The Weiner Litigation did not include any claims for professional misconduct or malpractice and therefore was not within the professional negligence or malpractice exclusion in the Arbitration Settlement Agreement.

² Because the automatic stay had already intervened by that time as to Slater, the Appellate Division affirmed the decision of the Superior Court of New Jersey solely in regards to Gersten and Gersten Slater.

The Weiner Litigation, which had begun three years prior to the execution of the Arbitration Settlement Agreement, was referenced therein. Paragraph five of the Arbitration Settlement Agreement stated that the Debtor “relinquishes all rights which he has or may acquire in the counterclaim pending in [the Weiner Litigation]...” Provision was made for allocation of certain attorneys fees that had been incurred by the Debtor in the Weiner Litigation. The Weiner Litigation was not otherwise explicitly mentioned.

In his objection to the Claim, the Debtor argues that Gersten’s failure to assert a claim for contribution against him in the Weiner Litigation bars Gersten’s claim under New Jersey state law. The Debtor also argues that the Arbitration Settlement Agreement and the Individual Release bar Gersten’s claim for contribution stemming from the Weiner Litigation. Conversely, Gersten argues that the Arbitration Settlement Agreement could not have covered a contribution claim arising out of the Weiner Litigation because the Claim had not accrued at the time the Arbitration Settlement Agreement was signed and that as a matter of contract interpretation the Individual Release did not include the contribution claim because it only included release of claims up to the date of the Individual Release.

Discussion

Gersten’s Claim for Contribution is Barred Under New Jersey Law

The Debtor’s position is that the Claim is barred by the failure to assert a contribution claim in the original action as required by New Jersey Court Rule 4:75³ and

³ Rule 4:7-5(b) reads in pertinent part: “A defendant *shall* assert a claim for contribution... against any party to the action by inserting in his answer... a general demand for contribution... from a named party and specifying the statute under which such claim is made.” (*emphasis added*).

the entire controversy doctrine codified in New Jersey Court Rule 4:30(A).⁴ New Jersey's Court Rules mandate that a party who wishes to preserve a contribution and indemnification claim make the claim in the initial action as a compulsory cross-claim for contribution and indemnification even though the liability for that claim is contingent on the ultimate outcome of the original litigation. The New Jersey Court Rules require a party to assert a general claim for contribution in the original action, thereby putting all parties to the action on notice of such a claim, while allowing the party to later specify the precise amount for which contribution is sought.

Under New Jersey's entire controversy doctrine, "non-joinder of claims or parties required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine." The doctrine holds that all claims and defenses arising out of the underlying legal controversy can be litigated in *only one* court. Geco Corp. v. H.D. Smith Wholesale Drug Co., 2006 WL 3359652 *4 (D.N.J.); Cogdell v. Hospital Center, 560 A.2d 1169, 1172 (N.J. 1989). A claim is part of the underlying legal controversy if it arises from related facts, the same transaction or series of transactions. Geco Corp., 2006 WL 3359652 *4.

The entire controversy doctrine is more preclusive than *res judicata*. Lubrizol Corp. v. Exxon Corp., 929 F.2d 960, 965 (3d Cir. 1991). "The purpose of the doctrine

⁴ Neither the Arbitration Settlement Agreement nor the Individual Releases contain a choice of law provision. Under New Jersey law embodied in the New Jersey Court Rules and the entire controversy doctrine the contribution claim must be asserted in the first action and under New York law the contribution claim can be asserted by way of a separate action after resolution of the first action. Therefore, because New Jersey and New York law differ and this difference is outcome determinative this Court must determine which state's law to apply. See Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). This Court applies New Jersey law based on the rules governing the resolution of choice of law issues. Indosuez Int'l Finance B.V. v. Nat'l Reserve Bank, 98 N.Y.2d 238, 245 (N.Y. 2002). New Jersey had the most significant contacts with the Weiner Litigation. The operative facts on which the Weiner Litigation was based occurred in New Jersey. The New Jersey courts applied New Jersey law in resolving the litigation. Finally, it is the state whose courts issued the judgment and whose court rules governed throughout the litigation.

includes the needs of economy and the avoidance of waste, efficiency and the reduction of delay, fairness to parties, and the need for complete and final disposition through avoidance of ‘piecemeal decisions’.” Cogdell, 560 A.2d at 1173.

As a result of the entire controversy doctrine, a claim for contribution that is not asserted in the original action is barred in any later action.⁵ Federal courts have applied New Jersey’s entire controversy doctrine to bar claims not asserted in a prior action. See Fireman’s Fund Ins. Co. v. Allied Programs Corp., 1993 WL 481344 (S.D.N.Y. 1993) (finding a claim for indemnification barred under the doctrine); Petrocelli v. Daniel Woodhead Co., 993 F.2d 27 (3rd Circ. 1993) (court found later action barred stating that all related claims must be initially joined before one court so that the court is fully informed and can therefore exercise its discretion in deciding whether to adjudicate the claims jointly or separately); Airwork Corp. v. Energy Maintenance Corp., 1993 WL 534329 * 6 (D.N.J. 1993) (finding the doctrine barred a later action because the claims in the federal court action were not “independent of the contracts at issue in the [state court] action, but rather wholly contingent on the disposition of rights and liabilities in that suit.”). The cross-claim must be made notwithstanding the fact that the contribution claim has not accrued for statute of limitations purposes. Bendar, 588 A.2d at 1273; see also Pressler, Current N.J. Court Rules, R. 4:7-5 Comment (1991).

Gersten’s claim in this Court is entirely based on the Weiner litigation, which sought to end a partnership among the Weiner parties, Gersten and the Debtor and to adjudicate the rights among the various parties. The claims required to be asserted in the

⁵ While the doctrine allows a claimant to file a late claim for contribution by leave of the court in the original action, the appropriate forum in which Gersten would have had to make a late claim was the New Jersey state court during the pendency of the Weiner Litigation. Bendar v. Rosen, 588 A.2d 1264, 1273 (N.J. Super. App. Div. 1991) (following the doctrine, the court, in a pretrial order, granted leave to file a late cross-claim).

Weiner Litigation extended to whatever claims the Debtor and Gersten had against each other as a result of the disposition of Weiner's claims adversely to themselves. If the Claim were allowed to be asserted in this Court it would violate New Jersey's entire controversy doctrine.

Gersten cites a line of New York cases for the proposition that a contribution claim does not accrue until the party claiming contribution pays money to a third person for which contribution is sought. E.g. Quinn v. Spitale, 203 A.D.2d 674 (3rd Dep't 1994); McDermott v. New York, 50 N.Y.2d 211 (1980). Reliance on these cases by Gersten is misplaced because they are based on New York law rather than New Jersey law. "While technically the right of contribution does not arise until a tortfeasor has paid more than his pro rata share, the [New Jersey] entire controversy doctrine and judicial economy militate for the claim being asserted in the underlying tort action." Fireman's Fund Ins. Co., 1993 WL 481344 *11 (federal court in New York applied New Jersey entire controversy doctrine instead of New York law).

While the doctrine is inapplicable to claims that are unknown at the time of the original litigation, the Claim was not unknown. Gersten cannot claim that he was unaware of a possible claim for contribution against the Debtor stemming from the Weiner Litigation. Moreover, Gersten admits in his certification that he believed he, the Debtor, and Gersten, Slater & Co., would prevail on their defenses and counterclaims against Weiner. Gersten Cert. at 3. Gersten's overconfidence in his defenses to the Weiner Litigation does not convert into a lack of foreseeability that if unsuccessful he and the Debtor would be jointly liable on any judgment and would have claims against each for contribution. In the Arbitration Settlement Agreement, the Debtor relinquished any

right to a possible upside from recovery on the sizeable counterclaim asserted against Weiner. See Arbitration Settlement Agreement, p. 3. The relinquishment of this upside potential to Gersten indicates that Slater was not expected to bear any further exposure in the Weiner Litigation as between himself and Gersten.

GERSTEN'S CLAIM IS BARRED UNDER THE ARBITRATION SETTLEMENT AGREEMENT AND THE INDIVIDUAL RELEASE

Even if Gersten is not barred under the entire controversy doctrine, he is nonetheless barred from recovery, as a matter of contract law, under the Arbitration Settlement Agreement and the Individual Release given to the Debtor.⁶

General principles of contract law apply to the interpretation of the Arbitration Settlement Agreement and the Individual Releases. Wright v. Eastman Kodak Co., 445 F.Supp.2d 314 (W.D.N.Y. 2006); In re Worldcom, Inc., 296 B.R. 115 (Bankr. S.D.N.Y. 2003). A release must be interpreted to give the intent of the parties effect as indicated by the clear meaning of the words used by the parties. Krumme v. WestPoint Stevens Inc., 238 F.3d 133 (2nd Cir. 2000); RBS Holdings, Inc. v. Wells Fargo Century, Inc., 485 F.Supp.2d 472 (S.D.N.Y. 2007).

If the language of a release is unambiguous the court as a matter of law can interpret the contract's meaning. Where no ambiguity exists the court need not resort to extrinsic evidence. Consolidated Edison Inc. v. Northeast Utilities, 2004 WL 1900362 (S.D.N.Y. 2004); In re Transtate Ins. Co., 747 N.Y.S.2d 243 (2d Dep't 2002). If a contract is clear on its face, the words will be given their effect notwithstanding the fact that one party claims that he intended the words to import a different meaning. Chaudhry v. Garvale, 692 N.Y.S.2d 447 (2d Dep't 1999). Further, this court recognizes that words

⁶ The parties have not stated that there is a difference between New York and New Jersey law on the contractual issue.

of general release are “clearly operative not only as to all controversies and causes of action between the releasor and releasees which had, by that time, actually ripened into litigation, but to all such issues which *might* then have been adjudicated as a result of pre-existent controversies.” Lucio v. Curran, 2 N.Y.2d 157, 161-2 (1956); NJ Boys, Inc. v. Eklecco, LLC, 2 A.D.3d 511 (N.Y. App. Div. 2003). The language of the Arbitration Settlement Agreement informs the intent of the Individual Release which was to resolve any and all claims by or arising out of Gersten Slater.

The Arbitration Settlement Agreement and the Individual Release are clear and unambiguous. This Court can interpret their meaning without looking outside the four corners of the documents. The Arbitration Settlement Agreement does what it purports to do—it ends the business relationship between the Debtor and Gersten. In ending the business relationship the purpose of the agreement was to assign the assets and liabilities of Gersten Slater to the different parties involved. In the Arbitration Settlement Agreement the Debtor relinquished signing power on the business’ bank accounts, all rights he had to the counterclaim in the Weiner Litigation, among other business related rights. Pursuant to the Arbitration Settlement Agreement, Gersten remained sole shareholder of the business, received sole signing power over the business’ bank accounts, received the right to any recovery on the counterclaim in the Weiner Litigation counterclaim and was to wind up the affairs of Gersten Slater. The claims in the Weiner Litigation were contingent liabilities of Gersten Slater as well as of Gersten and the Debtor. Even if a claim is contingent “a release in general terms will serve [to release it] if the intent be plain.” Altman v. Curtiss-Wright Corp., 124 F.2d 177, 180 (2nd Cir. 1941). Gersten’s argument that the Individual Release only released claims up to the date

of the Individual Release ignores the fact that the claim was already a contingent liability of Gersten Slater at that time.

Here, by expressly referring to the Weiner Litigation counterclaim in the Arbitration Settlement Agreement, it is clear that Gersten and the Debtor were aware of the Weiner Litigation and the possibility, even if in Gersten's view unlikely, that the Weiner parties might prevail. Indeed, the very assignment of the counterclaim to Gersten makes it clear that the risk of the outcome of the litigation as between Gersten and the Debtor was to rest on Gersten. Following the signing of the Arbitration Settlement Agreement, Gersten and the Debtor were no longer partners. It is plain that the contingent liability of the long pre-existing Weiner Litigation was among the claims being released in the Individual Release. Gersten's argument that he lacked an opportunity to bring the contribution claim because the claim had not yet accrued ignores New Jersey law on this subject. The New Jersey Court Rules expressly created a vehicle through which Gersten could have asserted a general claim for contribution against the Debtor in the Weiner Litigation to preserve his rights. R. 4:7-5(b); See discussion supra.

CONCLUSION

For the reasons set forth above the Court grants the Debtor's motion for summary judgment.

Settle Order.

Dated: March 19, 2008
New York, New York

/s/ Prudence Carter Beatty
United States Bankruptcy Judge