

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 49

CAMMEBY'S EQUITY HOLDINGS, LLC,

Plaintiff,

-against-

MARINER HEALTH CARE, INC., et al.,

Defendants.

INDEX NO. 650778/2011

MOTION DATE Dec. 2, 2011

MOTION SEQ. NO. 007

MOTION CAL. NO.

The following papers, numbered 1 to ___ were read on this motion for summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

PAPERS NUMBERED

Cross-Motion: [] Yes [] No

Upon the foregoing papers, it is ordered that this motion for summary judgment is decided in accordance with the accompanying decision and order.

Dated: March 15, 2012

O.P. Sherwood
O. PETER SHERWOOD, J.S.C.

Check one: [] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: [] DO NOT POST [] REFERENCE

[] SUBMIT ORDER/ JUDG.

[] SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49**

-----X
CAMMEBY'S EQUITY HOLDINGS LLC,

Plaintiff,

-against-

**MARINER HEALTH CARE, INC.,
NATIONAL SENIOR CARE, INC., and,
HARRY GRUNSTEIN,**

Defendants .

**DECISION AND
ORDER**

Index No. 650778/2011

-----X
Hon. O. Peter Sherwood, J.

On this motion for summary judgment (motion sequence no. 007), plaintiff, Cammeby's Equity Holdings LLC ("plaintiff" or Cam Equity"), and defendants, National Senior Care Inc. ("NSC"), Mariner Health Care, Inc. ("Mariner")¹ and Harry Grunstein ("Grunstein") (together with Mariner and NSC, "defendants"), dispute the effect of an option agreement ("the Option Agreement" or the "Option") entered into by the parties in December 2004 (and later amended June 2006). Plaintiff seeks an order granting summary judgment, directing defendants to cede control of NSC in advance of a closing of the transaction and requiring defendants to work with Cam Equity to proceed promptly with the transaction. Defendants argue that specific performance is an equitable remedy and they cite several reasons why the hand of equity must be stayed in these circumstances.

In its memorandum of law in opposition to the motion, Mariner announced that defendants will be "imminently moving" for leave to amend their answer to assert fraudulent inducement as an affirmative defense based on the alleged failure of plaintiff's affiliate, Cammeby's Funding II LLC ("Cam II"), to make good on an alleged promise made in 2005 to fund \$25 million of an unfunded 2004 commitment with loan proceeds of a 2006 refinancing transaction. The motion to amend has

¹NSC is the sole owner of Mariner. References to NSC thus implicitly include Mariner.

not been filed and the court will not address the matter in this Decision and Order. However, such a motion was filed in the related case of *Schron v Grunstein*, Index number 650702/2010 (“*Schron*”).

Defendants, NSC and Grunstein, have submitted a motion in this case (motion sequence 008) for permission to submit additional “evidence relevant to (the) pending summary judgment motion”. That evidence consists of deposition testimony of Grunstein that he failed to read documents he signed confirming that the \$25 million loan was funded. The court hereby grants that motion, though, as is further explained below, this evidence does not change the outcome of the summary judgment motion. A similar motion to submit additional evidence is pending in *Schron* and is disposed of today along with the Decision and Order in *Schron*.

On August 26, 2011, this court granted, in part, plaintiff’s motion for a preliminary injunction (“August 26 Decision”). The court enjoined defendants from dissipating the assets of Mariner, NSC, or their subsidiaries and directed defendants to cooperate with plaintiff as it seeks to obtain regulatory approvals, but denied plaintiff’s request to assume immediate control of NSC. This motion for summary judgment was filed on September 12, 2011.

In the course of the August 26 Decision, the court made a number of findings that are particularly relevant on the present motion. Specifically, the court (1) rejected defendants’ claim that regulatory approvals are needed before the option agreement can be exercised, (2) rejected the claim that the Option is void for want of consideration, and (3) rejected the claim that plaintiff must satisfy an outstanding debt obligation of defendant, NSC, to Cam II, as a precondition to exercise of the Option. Some further discussion of the last finding relating to the alleged debt obligation issue is warranted.

As the court (Yates, J.) held in *Schron*, 32 Misc3d 231, 239 (Sup Ct NY Co 2011), defendants are barred from offering parol evidence to avoid enforcement of the Option. No more is required to foreclose any attempt by defendants to use extrinsic evidence to create material issues of fact sufficient to defeat plaintiff's motion for summary judgment.

Even if the court were to consider extrinsic evidence, the defense predicated on defendants' reading of Section 2.2 of the Intercreditor Agreement fails. At the time NSC entered into the original option agreement in 2004, it also entered into a revolving credit facility with Capital Source Finance LLC ("CapSource") and a term loan agreement with Cam II ("Term Loan"). CapSource was the senior lender in the transaction. NSC pledged its shares to CapSource and Cam II as collateral for the loan. At the same time, NSC, CapSource and Cam II signed an Intercreditor Agreement which gave CapSource rights to the collateral superior to those of Cam II. Cam Equity, which is the holder of the Option, is not a party to either the Term Loan or the Intercreditor Agreement. Cam Equity is affiliated with Cam II and is referenced in both the Term Loan and the Intercreditor Agreement.

The 2004 agreements were amended as of June 9, 2006, as was the Option.² Section 2.2 of the Second Amended Intercreditor Agreement provides:

2.2 Payment blockage. Until the Senior Indebtedness shall have been paid in full in cash and the Senior Commitment shall have been terminated pursuant to the respective terms and provisions thereof, no payments (in cash, other property, by set-off or otherwise) or other distributions whatsoever in respect of any Junior Indebtedness shall be made, provided, however, that Cammeby's Equity Holdings, as an Affiliate of the Junior Creditor, shall be permitted to accept any non-cash payment (payment in kind), and national or Mariner shall be permitted to issue equity securities in exchange for the satisfaction of the Junior Indebtedness pursuant to the Stock Purchase Option Agreement described in the schedules to the Senior credit Agreement.

²Plaintiff asserts that the amendment did not effect any change that is material to this case. Defendants have not disputed this claim and the court has not found any material differences between the two versions of the Option.

The Term Loan was also amended to replace Section 2.3(g) with a new "Section 2.15" which provides relevant in part:

(d) Nothing contained in this Section is intended, or shall be deemed or construed, to in any way prohibit, limit or restrict(Cam Equity) or its successors or assigns from exercising that certain stock purchase option ... to acquire 66.67% of all issued and outstanding shares of every class of capital stock of NSC in exchange for extinguishing Term Loan B hereunder, all in accordance with the terms of such stock purchase option and the other Loan Documents.

"Term Loan B" is the Cam II loan to NSC which defendants claim was not funded.

Despite the terms of these provisions which do not require extinguishment of the debt, defendants argue that Plaintiff may exercise the Option only if it first extinguishes NSC's loan obligations to Cam II under the terms of the Term Loan and the Intercreditor Agreement. Section 2.15 of the Term Loan provides otherwise. It acknowledges plaintiff's right to acquire 66.67% of the stock of NSC "in accordance with the terms of (the Option) and the other Loan Documents." Similarly, under Section 2.2 of the Intercreditor Agreement, the debtor, NSC, is permitted to issue equity shares in exchange for satisfaction of the Cam II loan "pursuant to the [Option]." Section 2.2 does not state that satisfaction of the Cam II loan is the *sole* means by which consideration for the purchase may be paid.

The Option permits, but does not require, that the consideration for the purchase be paid by assumption or satisfaction of the NSC debt. CamEquity may, in its sole discretion, pay the purchase price by satisfaction of the NSC debt or by cash in any combination of its choosing. Further, were the court to interpret Section 2.15 and Section 2.2 in the manner urged by defendants, CamEquity, a non-party to the Term Loan and Intercreditor Agreement, would be required to tender \$25 million of value in exchange for a 66.67 equity interest in NSC despite the fact that the Option strike price

is “the *lesser* of \$25,000,000.00 or the consolidated net book value of NSC and its subsidiaries” (Option, Section 1)(*emphasis added*).

Defendants next claim that it is impossible for Plaintiff to extinguish the loan because Cam II never actually funded the loan to NSC (*see* Mariner Memorandum of Law, p. 16). As discussed above, there is no requirement binding on Cam Equity that any loan be extinguished as a precondition to exercise of the Option. In any event, plaintiff disputes this assertion and claims that Cam II made a \$25 million loan to NSC as of December 2004. As evidence, plaintiff offers a signed letter from defendant and NSC president, Harry Grunstein, confirming that a \$25 million loan was funded. In rebuttal, defendants offer the deposition testimony of Grunstein who testified that the loan was not funded, that he never read the letter and that “anything [it] states about having received 25 million is a mistake and a mistake on my part for signing it” (H. Grunstein Deposition, December 14, 2011, p. 258). Defendants also reference the deposition of the former chief financial officer of NSC and of a forensic accountant that they found no evidence that the loan was funded.³ The court has already held that this evidence is insufficient to merit denial of the motion for summary judgment (*see also Schechter Assocs. v Major League Baseball Players Assn.*, 252 AD2d 97, 98 [1st Dept 1998][“[g]iven the clarity with which defendant by its pre-litigation conduct acknowledges the obligation now at issue, defendant’s subsequent protestations of inadvertence and error were not sufficient to raise a factual issue necessitating a trial”]).

The court has already determined that the Option is valid. The claim that the court should look beyond the recitation in the Option that it was given in “consideration for the mutual covenants and agreements hereinafter set forth” has already been decided (*see* August 26 Decision and *Schron*).

³The loan is listed as a receivable on Cam II’s books.

Plaintiff has issued a Notice of exercise that fully complies with the terms of the Option. Plaintiff is entitled to purchase 66.67% of the capital stock of NSC or Mariner for the lesser of \$25 million or the net consolidated book value of NSC and its subsidiaries payable at the closing.⁴

Whether regulatory approvals are needed prior to actual transfer of control at the NSC level must be determined initially by the relevant regulatory agencies. To the extent that such approvals are required, actions to be taken at the closing are subject thereto (*see* Option, Section 3).

Defendants are obligated to assist plaintiff in determining the net consolidated book value of NSC and to take no action that would conflict with or frustrate plaintiff's efforts to exercise its rights to acquire control of NSC and Mariner.⁵ Also the shareholders, directors and officers of NSC and Mariner are obligated to take the steps necessary to enable plaintiff to realize the rights secured to plaintiff under the terms of the Option.

Accordingly, it is

ORDERED motion sequence 008 seeking the submission of additional evidence is GRANTED, and it is further

ORDERED that plaintiff's motion for summary judgment as to its first cause of action (breach of contract) is GRANTED, and it is further

ORDERED that defendants NSC and Mariner shall cooperate with plaintiff, Cam Equity (1) to determine the net consolidated book value of NSC, (2) to determine whether regulatory approvals

⁴As the court held in the Decision and Order in *Schron*, decided along with the Decision and Order in this case, the phrase "upon exercise" as used in the Option is clear. The consideration must be paid at the closing.

⁵If a triable issue of fact arises as to the amount to be paid at the closing, an immediate trial will be scheduled to determine this limited issue. Counsel shall address the issues of whether and when a trial should be held at their appearance on April 3, 2012.

are required and assist in securing such approvals where required and (3) to take and complete such actions as needed in compliance with Section 7 of the Option; and it is further

ORDERED that defendants Harry Grunstein, NSC and Mariner are hereby enjoined from taking any action (except actions before the courts in defense of this action) that would conflict with or frustrate plaintiff's efforts to exercise its right to acquire NSC or Mariner.

This constitutes the decision and order of the court.

DATED: March 15, 2012

E N T E R,



O. PETER SHERWOOD

J.S.C.