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

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ALTERNATIVE GLOBAL SIX, LLC

Plaintiff,

- v -

DURHAM HOMES LLC,

Defendant.

INDEX NO. 653837/2022

MOTION DATE 05/01/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

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HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74

were read on this motion to/for DISMISS.

This action stems from an alleged breach of the terms of a revolving note and security agreement executed in favor of plaintiff lender Alternative Global Six LLC (AG6) by defendant borrower Durham Homes LLC (Durham). Plaintiff alleges a single cause of action for breach of contract for defendant's failure to repay the loans and attendant interest totallying$7,277,969.00 along with attorneys' fees and costs. Plaintiff also seeks an appointment of a receiver. Defendant moves pursuant to CPLR 3211(a)(1), (a)(3), and (a)(7) for an order dismissing plaintiff's complaint. Plaintiff opposes the motion.

For the reasons stated below, defendant's motion to dismiss is denied.

Background

Unless otherwise indicated, this background is derived from the allegations in plaintiff's verified complaint, which are accepted as true for the purposes of this motion (NYSCEF # 40 - complaint).

On July 10, 2020, plaintiff and defendant entered into a revolving note and security agreement (the Note) to secure loans plaintiff advanced to defendant for the purpose of building and selling homes to consumers in real estate developments in the United States (*id.* ¶ 7 and Exhibit 1, Note [appended to complaint]). Under the Note, "[e]ach [term] loan shall be payable interest only at the amount so specified herein and due on the twelve-month anniversary of the advance of the

principal amount, which shall be automatically renewed if no written demand for repayment is made thirty days prior to any Maturity Date" (*id.* ¶ 8 quoting Note at 5 [emphasis omitted]). The interest rate on the outstanding principal of each term loan was set at 15% and due on the first day of each calendar month or, alternatively, on the closing date of each home sold in which the funds were used for home building (*id.* ¶¶ 9, 10). In the time between July 10, 2020, to March 25, 2021, plaintiff advanced defendant 23 loans totaling $5,995,000 (*id.* ¶ 11).

By April 1, 2022, the unpaid principal remained $5,995,000 and the unpaid interest at 15% was $734,426.88, as alleged in the complaint (*id.* ¶17). And since defendant failed to pay interest on all the Term Loans, the default rate interest of 18% went into effect on April 2, 2022, pursuant to section 3(B) of the Note (*id.* ¶ 19). By October 1, 2022, the complaint concludes that the accelerated amount due consisted of the principal of $5,995,000 and interest of $7,277,969.18 totaling $7,277,969.18 (*id.* ¶ 20). Thus, plaintiff AG6 brings this suit seeking to recover from defendant's alleged failure to make payments in accordance with the Note.

Defendant's motion to dismiss challenges plaintiff's standing to bring this suit as plaintiff failed to obtain authorization from its manager, non-party Alternative Global Management, LLC (AGM) (NYSCEF # 58, MOL at 3). Defendant explains the corporate structure consists of AGM at the top as the 100% owner of affiliates known as Alternative Numbered Entities (affiliates), of which there are seven (known as Alternative Global One, Alternative Global Two, etc.) and of which the three principals, Richard Cardinale, Michael Dazzo, and David Feingold had equal ownership interests and were individual managers (*id.* at 1-3; NYSCEF # 39, Feingold aff ¶¶ 6-7). Plaintiff is Alternative Global Six (AG6). On January 28, 2022, Feingold and Dazzo resigned from the affiliates due to Cardinale's alleged wrongdoings (MOL at 2-3).

According to defendant, upon the unanimous consent of the affiliates, AGM was formed for the sole purpose of managing these affiliates (*id* at 2). The business plan underlying this corporate structure is to have the affiliates borrow money from non-party L3 Capital Income Fund, LLC (L3 Capital), an investment company whose sole manager is Richard Cardinale. "Those borrowed funds would be deployed in various lines of business designated for each of the [affiliates]. . ." and "[w]hen those business lines generated profits, the funds would flow through the particular [affiliate] for such business line to AGM for (i) distribution to L3 Capital for repayment, and (ii) any remaining amounts split among [the three principals]" (*id.* at 2-3).

Defendant states that Cardinale sent the Amended and Restated Limited Liability Company Agreement of AGM (AGM's Operating Agreement), effective February 1, 2021, to all his investors along with Cardinale's letter informing the investors that "the operation of the business under said document, provides that the

management and control of the business and affairs of AGM is vested in the Manager" (*id.* at 3 citing NYSCEF 41, AGM's Operating Agreement, section 6.01). AGM's initial manager is RMD Holdings; RMD is derived from the first letter of the first names of Richard Cardinale, Michael Dazzo, and David Feingold (*id.* at 3). As AGM manages and controls the affiliates, this lawsuit by AG6 must be approved by unanimous consent of AGM's managers, Feingold, Dazzo, and Cardinale, which plaintiff does not have (*id.*).

Defendant also claims that there is no breach of contract because the Note is not in default (*id.* at 4). Defendant claims that the Note is not a debt instrument; rather the Note serves to create a security interest for plaintiff's investment in defendant (see NYSCEF # 38, Baldassarra aff ¶ 16; NYSCEF # 39, Feingold aff ¶ 47). Defendant points to the indefinite payout schedule in the Note as indicative that the Note is not a debt instrument (Feingold aff ¶ 47).

Defendant explains that when plaintiff AG6 was set up, AG6 and defendant entered into a joint venture agreement (JV Agreement) and a Revolving Note on July 10, 2020 (*id.* at 5). The JV Agreement provided that AG6's "absolute obligation" [was] to 'provide all capital for the operation of the venture'" while AG6 was to manage and oversee the running of operation including the funding aspect (*id.* quoting NYSCEF # 54, exhibit O[1] - the JV Agreement, § 1). Defendant states that there was an "indefinite compensation provision," which defendant claims is "consistent with the indefinite payout schedule in the subservient Note" (*id.* at 7). Defendant fails to include an explanation or details as to the indefinite compensation provision.[2] But defendant points to the indefinite payout schedule in section 2(A) (a.ii) of the Note as follows:

> In the event that Borrower has utilized the funds for homebuilding then repayment of interest shall be paid, if Borrower so elects, on the closing date of each home sold in which the funds were used for home building, rather than payment on the first day of each calendar month.

(*id.* at 8 quoting the JV Agreement § 2(A) (a.ii)). Defendant further states that section 3 of the JV Agreement provides for the payout structure, and as per that provision, defendant made two payouts, $332,885.82 as interest payment on July 30, 2021, and $200,000 on March 18, 2022 (*id.*). Defendant paid the $200,000 payout after a discussion with Cardinale on behalf of plaintiff in exchange for terminating the Note and any secured interest plaintiff may have in defendant. But plaintiff would still have its investment the Joint Venture but waive its right to impose any encumbrances including liens on the homes (NYSCEF # 39, Feingold aff ¶ 56).

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[1] Defendant's MOL mistakenly identifies the JV Agreement as Exhibit A.

[2] Page 6, which preceded "[t]he foregoing indefinite compensation provision" on page 7, is not included in defendant's uploaded MOL.

In support of its motion to dismiss, defendant submits the affidavit of Steven Baldassarra,[3] defendant Durham Homes' "indirect owner," who adds that section 3 of the JV Agreement also provides how AG6 is to be compensated – a 15% interest rate on the capital AG6 provides to be paid "upon the sales of the Homes" and 50% of the profits from the sale any closing of the sale of a Lot or Home to a consumer," to be paid upon the closing (NYSCEF # 38, Baldassarra aff ¶¶ 1, 13 quoting the JV Agreement § 3 (a) and (b)). Baldassarra notes that plaintiff has not identified any homes that were sold to trigger defendant's payment requirement (*id.* ¶ 15).

Finally, defendant asserts that this action should be dismissed because plaintiff is not authorized to do business in New York (*id.* at 15). Citing section 802 of the Limited Liability Company Law, defendant argues that plaintiff, a Delaware company, does not have the required certificate to conduct business in New York (*id.*). Yet, Cardinale lives in Staten Island, NY and conducts plaintiff's business from his home (MOL at 8).

In opposition, plaintiff summarizes that the undisputed and relevant facts are that the parties signed the Note, and based on the Note, plaintiff advanced the funds to defendant, defendant made only two payments on the Note but failed to make further payments pursuant to the terms of the Note (NYSCEF # 60 MOL in Opp at 3). Specifically, defendant underscores the definitions in the Note as constituting a debt instrument. For example, the description of the parties as "Lender" and 'Borrower"; Loan Documents; Term Loan; and Event of Default"; "Default Rate" (*id.* at 3-4).

Addressing defendant's standing argument, plaintiff asserts that the AG6 Operating Agreement provides plaintiff with the authority and legal capacity to institute this action, and that AGM, which is a separate legal entity, does not dictate plaintiff's authority to institute the action. Plaintiff also asserts that, contrary to defendant's claim that unanimous consent of AGM's managers is needed for plaintiff to institute an action, defendant fails to show that AGM conclusively owns 100% of AG6 (*id.* at 6-8). To bolster this assertion, plaintiff quotes from a decision rendered in one of several cases involving the affiliates, Cardinale, Feingold, and Dazzo in federal and state courts and in different jurisdictions:

> The Court finds that there is a written agreement, the Amended and Restated LLC Operating Agreement for Alternative Global Management, LLC, (the "AGM Agreement"); however, the AGM Agreement pertains to Alternative Global Management, LLC ("AGM"). AGM and the Alternative Numbered Entities are separate legal

[3] Baldassarra is also a manager of Broadstreet Global Fund, LLC, a private equity fund; as of July 2022, Feingold became CEO of Broadstreet, Inc. (NYSCEF # 38, Baldassarra aff ¶ 6). Baldassarra also sources funds for defendant and oversees their finances for defendant, which is operated by two brother, Martin and Robert Childress (id. ¶ 2).

> entities. The Alternative Numbered Entities did not enter into or sign the AGM Agreement. The AGM Agreement is a totally different. operating agreement for a totally different entity. It makes no mention of the Alternative Numbered Entities.

(Id. at 7 quoting *Alternative Global One, LLC et al v David Feingold et al*, 2023-000688-CA-01 [11th Cir., May 06, 2023]). Plaintiff maintains that under the AG6 Operating Agreement, Cardinale, the AG6's sole remaining member, has the right to institute this action and refutes defendant's representation that Cardinale agreed to terminate the Note in exchange for a payment of $200,000 as blatantly false (MOL in Opp at 2; *see also* NYSCEF # 67, Cardinale aff §§ 8-9).

Finally, as to defendant's claim that plaintiff is not authorized to do business in New York, plaintiff attaches a certificate showing that plaintiff registered the New York State Department of State on May 24, 2023 (NYSCEF # 74). Defendant notes that the registration date is after the date plaintiff commenced this action, and therefore, plaintiff is still in violation of LLCL § 802 (NYSCEF 72 at 1-2). Defendant adds that as there is no showing that plaintiff paid all taxes since its inception in 2020, plaintiff cannot maintain this action (id. at 1).

Defendant informs that there are vital documents, such as tax returns, in a separate federal action in Florida that speak to this motion. But because Cardinale marked most of the documents as highly confidential, defendant cannot produce them in this action. And defendant does not dispute the above-quoted excerpt of the Circuit Court decision finding AGM and the Alternative Numbered Entities to be separate legal entities because this finding does not detract from AGM's total ownership and control over the Alternative Numbered Entities (*id.* at 5). Defendant asserts that those tax returns would bear out defendant's claims (*id.* at 6).

Discussion

On a motion to dismiss pursuant to CPLR 3211 (a)(7), 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 into any cognizable legal theory" (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]). Significantly, "whether a plaintiff . . . can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss" (*Phillips S. Beach LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 497 [1st Dept 2008], *lv denied* 12 NY3d 713 [2009]).

At the same time, "[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference' " (*Morgenthow & Latham v Bank of New York Company, Inc.*, 305 AD2d 74, 78 [1st Dept 2003]

[internal citation and quotation omitted]). However, dismissal based on documentary evidence under 3211(a)(1) may result "only when it has been shown that a material fact as claimed by the pleader is not a fact at all and no significant dispute exists regarding it" (*Acquista v New York Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001]), quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

In its moving papers, defendant advances three basis to dismiss plaintiff's complaint: a) plaintiff does not have legal standing or capacity to initiate this action as it is not the real party in interest; b) documentary evidence supports the position that defendant is not in breach of the note, and c) plaintiff is a foreign company unauthorized to do business in New York.

Standing and Capacity to Sue

CPLR 3211 (a)(3) provides that a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the party asserting the cause of action has no legal capacity to sue. For a business entity to have legal capacity to sue, a plaintiff is required to allege facts sufficient to demonstrate that the action was duly authorized in accordance with its governing documents (*see Board of Managers of Clermont Greene Condominium v Vanderbilt Mansions, LLC*, 44 Misc 3d 1205(A) [NY Sup 2014]. A business entity's capacity to sue or be sued is a subject for "statutory capacity" analyses (*Cmty. Bd. 7 v Schaffer*, 84 NY2d 148 [1994]. However, capacity must be found based on an express legal grant of capacity or on a necessary implication from a grant of other legal powers (*Silver v Pataki,* 274 AD2d 57, 61 [1st Dept 2000]).

Standing to sue requires an interest in the claim at issue that the law will recognize as a sufficient predicate for determining the issue at the litigant's request (*Caprer v Nussbaum,* 36 AD3d 176 [2d Dept 2006]). If a plaintiff lacks standing, the plaintiff may not proceed in the action (*see Stark v Goldberg,* 297 AD2d 203 [1st Dept 2002]).

Defendant claims that plaintiff has no legal capacity to commence the action as defendant failed to obtain proper authorization from its parent company and manager, AGM, the real party in interest. According to defendant, the AGM Operating Agreement shows that AGM has total control and management of the Affiliated Numbered Entities, including plaintiff. In contrast, plaintiff asserts that plaintiff is independent of AGM, and its own AG6 Operating Agreement empowers it to bring this suit to protect its interest. That interest arises from the Note, under which plaintiff made term loans to defendant with a repayment schedule including interest payments and default interest payments as provided in the Note.

Here, defendant's argument on plaintiff's lack of legal capacity fails for this pre-discovery motion to dismiss. While defendant claims that section 6.01 of the

AGM Operating Agreement provides that the AGM manager has total control and management of the Alternative Numbered Entities, or, as defendant asserts, "Affiliates" in the AGM's Operating Agreement. On its face, there is nothing that connects the AGM's Operating Agreement to the Affiliated Numbered Entities.

Defendant's other offer of proof on its claim that AGM owns and controls 100% of the Alternative Numbered Entities is Cardinale's letter that was sent with the AGM operating agreement to his investors. Cardinale's letter to "Investor" speaks of two classes of units, Class A and Class B, and their respective voting rights. It would be a guess to definitively say that "Investor" is the Alternate Numbered Entities. This letter also states that Investor will own Class B Units in the LLC and have the right to profit-sharing but not in managing the operations of the LLC, which is AGM. It would be a jump, at this pre-discovery stage of litigation, to conclusively state that AGM definitively took over all the Alternative Numbered Entities such that the AGM operating agreement binds the Alternative Numbered Entities. And, as defendant recognizes, defendant's motion does not include the vital documents that would show that AGM wholly owns and has 100% of the Alternative Number Entities. According to defendant, these documents, which include tax returns, cannot be produced here because they were produced in another action involving the principals of AGM and are marked highly confidential. Defendant invites this court to request these documents from another court in another jurisdiction and draw conclusions about these documents to resolve the instant motion in its favor. This will not be done. As such, this motion to dismiss on capacity and standing grounds cannot be granted at this juncture.

Given this conclusion, plaintiff, as lender to defendant, has an interest to bring this suit. Plaintiff's operating agreement provides and empowers the manager "the sole right to manage the business of the Company and [] have all powers and rights necessary, appropriate, or advisable to effectuate and carry out the purposes and business of the Company'" (NYSCEF # 61, pltf's MOL ¶ 6 quoting NYSCEF # 62, AG6 Operating Agreement, Art. 9.1[c]). Thus, Cardinale, as the sole manager of AG6, can authorize the initiation of the action on behalf of plaintiff against defendant.

Breach of Contract

Defendant, relying on the JV Agreement, argues that the alleged Note is not in default, thereby defeating plaintiff's single breach of contract cause of action. Defendant avers that the parties did not intend for the Note to be a debt instrument. Defendant also states that in March 2022, on behalf of AG6, Cardinale agreed to accept the sum of $200,000 from Durham Homes in exchange for terminating the Note.

A motion to dismiss pursuant to CPLR 3211(a)(1) may be granted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*Morgenthow & Latham v Bank of N. Y. Co., Inc.,* 305 AD2d 74, 78 [1st Dept 2003]). And where "legal conclusions and factual allegations in the complaint are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference" (*id.* internal citations and quotations omitted]).

Here, the JV Agreement shows that plaintiff and defendant had agreed that plaintiff would provide capital for operation of the joint venture and defendant would be responsible for the management of the day-to-day operations of acquiring lots and building homes (NYSCEF # 54 at 1). The JV Agreement does not mention the Note, nor does the Note mention the joint venture.

As with defendant's arguments above on the capacity and standing issues, defendant relies on a document, here the JV Agreement, that on its own, does not connect the dots to the plaintiff's allegations. Rather, accepting the allegations in the complaint as true for the purposes of this motion to dismiss, as the court must, the Note outlines a clear intent of the parties to enter into a binding agreement under which plaintiff is obligated to advance monies to defendant on a promise and expectation that defendant will repay the said loan with the agreed upon interest as at when due. The JV Agreement alone does not contradict plaintiff's breach of contract claim. And defendant's claim that plaintiff accepted $200,000 to terminate the Note, without more than the respective affidavits of David Feingold and Steven Baldassarra, are insufficient to support a motion to dismiss.

Authorization to do Business in New York

"A foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state . . . (BCL § 1312 (a). Defendant seeks to dismiss this case arguing that pursuant to BCL 1312, plaintiff is not authorized to institute this action as AG6 has done business in New York without the requisite certificate from the secretary of state. Plaintiff registered and obtained authority to conduct business in New York on May 24, 2023. This action was commenced on May 1, 2023.

While plaintiff, a foreign limited liability company, commenced this action 23 days before it acquired to a certificate from the Secretary of State (*see* LLCL § 808[a]), New York is the selected forum in the Note (NYSCEF # 40, exhibit 1, § 9 [a.ii]). Failure to obtain a certificate of authority to do business in New York does not impair the validity of the Note where the parties chose New York as their choice of forum (LLCL § 808[b]; *see also Muzio v Alfano-Hardy,* 202 AD3d 1093, 1095 [2d Dept 2022]).

Conclusion

For the foregoing reasons, it is

ORDERED that defendant Durham Homes LLC's motion to dismiss is denied; it is further

ORDERED that within 30 days of the e-filing of this order, defendant shall file an answer to the complaint; and it is further

ORDERED that a preliminary conference shall be held via Microsoft Teams on May 29, 2024, at 10:30 a.m. or at such other time that the parties shall set with the court's law clerk.

This constitutes the Decision and Order of the court.

4/12/2024
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE