State of New York
Court of Appeals

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To be argued Thursday, September 10, 2020 (arguments begin at 10 am)

No. 42 CNH Diversified Opportunities Master Account, L.P. v Cleveland Unlimited, Inc.

In December 2005, Cleveland Unlimited, Inc., a wireless communications company in Ohio, issued $150 million in secured notes which were to mature in five years. Section 6.07 of the indenture, mirroring the language in section 316(b) of the federal Trust Indenture Act of 1939 (TIA), stated, "Notwithstanding any other provision of this Indenture, the right of any Holder to receive payment of principal of, premium, if any, and interest and Additional Interest, if any, on a Note, on or after the respective due dates expressed in such Note, or to bring suit for the enforcement of any such payment..., shall not be impaired or affected without the consent of such Holder." Section 6.05 said a majority of the noteholders "may direct the time, method and place of conducting any proceeding for exercising any remedy available to the [trustee]" to collect payment. A collateral trust agreement authorized the trustee to foreclose after a default upon the direction of a majority of the holders, and provided that no holder "shall have any right individually to realize upon any of the Collateral..., it being understood and agreed that all powers, rights and remedies ... may be exercised solely by the Collateral Trustee."

In April 2010, after the notes were sharply downgraded by Moody's Investors Service, CNH Diversified Opportunities Master Account L.P. and three other plaintiffs bought $5 million of the notes on the secondary market, which was 3.33% of the outstanding principal. When the notes matured in December 2010, Cleveland Unlimited could not repay the principal. In June 2011, after negotiations with the issuer, a majority of the investors holding 96% of the notes informed the plaintiffs that they intended to direct the collateral trustee to foreclose on Cleveland Unlimited's collateral, which consisted of all of the company's stock. The minority noteholders objected, saying they would seek full payment under the notes, but they did not attempt to enjoin the foreclosure. Three months later, in a debt-for-equity transaction, the stock was transferred to the collateral trustee in full satisfaction of the notes. The minority holders received 3.33% of the stock, their pro rata share.

In January 2012, CNH and the other minority holders brought this breach of contract action against Cleveland Unlimited and the guarantors of the notes, seeking full payment of principal and interest under the notes. They contended section 6.07 of the indenture and the TIA prevented the defendants from depriving them of their right to payment without their consent.

Supreme Court dismissed the suit. Reading the "unambiguous" indenture, collateral trust and security agreements together, it said, "there was a collective design to this transaction, and the Collateral Trustee was to act for all the noteholders in the event of the issuer's default, upon the direction of a majority of noteholders." The Appellate Division, First Department affirmed, saying, "A fair reading of the [agreements] demonstrates that the collateral trustee was authorized to pursue default remedies, including the strict foreclosure at issue here, if so directed by a majority of the noteholders." Section 6.07 "does not supersede the numerous default remedy provisions of the Agreements, nor does it conflict with them." Citing Marblegate Asset Mgt., LLC v Education Mgt. Fin. Corp. (846 F3d 1), in which the Second Circuit ruled the TIA "prohibits only non-consensual amendments to an indenture's core payment terms," the Appellate Division said the foreclosure and debt-for-equity transaction here "did not amend the core payment terms in violation of section 6.07..., even if it had a 'similar effect'...."

The plaintiffs, saying the lower courts misread Marblegate as barring only "formal" amendments to payment terms without consent, argue the debt-for-equity exchange, to which they objected, violated section 6.07 by terminating Cleveland Unlimited's obligations under the notes and thereby impaired their right to sue for payment. They say "the plain text of Section 6.07, which ... applies 'notwithstanding any other provision of the Indenture," makes clear that it "controls over any conflicting provisions."

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State of New York
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To be argued Thursday, September 10, 2020 (arguments begin at 10 am)

No. 28 Hewitt v Palmer Veterinary Clinic, PC

In April 2014, Marsha Hewitt brought her cat in a plastic carrier to the Palmer Veterinary Clinic in the Town of Plattsburgh. While Hewitt was waiting with her cat in the reception area, a Palmer veterinarian brought a dog out of an examination room, where it had just been treated for a paw injury, and handed its leash to its owner. The dog slipped its collar, jumped up on Hewitt from behind and grabbed her ponytail, pulling her backward and allegedly injuring her neck, arm and hand.

Hewitt brought this action against the Palmer Clinic seeking damages for negligence and premises liability. She contended the Clinic had "a duty to provide a safe waiting room for its customers" and " violated that duty by bringing a deranged pit bull into the same waiting area as a cat;" that it "failed to use due care in bringing an agitated, distressed, and deranged pit bull into the waiting area;" and it had "actual and/or constructive notice that the dog ... was dangerous." Hewitt's claims against the dog's owner were later discharged in bankruptcy. The Palmer Clinic moved for summary judgment dismissing the suit, contending that ordinary negligence and premises liability claims are not available for damages caused by a dog attack.

Supreme Court dismissed the suit. The established rule in New York is that "the owner of a dog may only be held legally responsible for injuries inflicted by such animal based upon a theory of strict liability and that a negligence claim does not lie," it said, citing Bard v Jahnke (6 NY3d 592) and other cases. Relying on Appellate Division precedent that extended the Bard rule to defendants who are the owners of property where a domestic animal they do not own causes injury, the court ruled that "Hewitt is limited to recovery in strict liability, which requires proof that the [dog] had vicious propensities and that Palmer ... knew, or should have known, of such propensities." It said Hewitt submitted no admissible evidence that Palmer had such notice.

The Appellate Division, Third Department affirmed on a 3-1 vote, adopting the view of the other Appellate Divisions which "applied the strict liability rule in cases where the plaintiff seeks to recover from a defendant who maintained the premises where the injury occurred, but did not own the dog.... Accordingly, we hold that for [Palmer] to be liable for the personal injuries allegedly sustained due to the dog attack..., [Hewitt] must establish that [Palmer] knew or should have known about the dog's vicious propensities," which is said she failed to do.

The dissenter said the Bard rule should not be extended to non-owners of the offending animal. "The rationale behind the 'vicious propensity rule' is that an animal owner is in a unique position, from day-to-day familiarity, to observe his or her animal's personality and demeanor and act accordingly based on that knowledge...," he said. "[I]t does not fit the situation where, as here, the defendant is not the animal's owner, but only the owner of the property on which the animal's injurious behavior occurred and, therefore, typically has no knowledge, one way or the other, of the animal's propensities. In such a case..., general principles of negligence and premises liability should apply...."

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