

Dabbah Sec. Corp. v Croesus Capital Corp.
2001 NY Slip Op 30089(U)
March 7, 2001
Sup Ct, NY County
Docket Number: 603521 /99
Judge: Walter B. Tolub
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. WALTER B. TOLUB
Justice

PART 15

DABBAH SECURITIES CORPORATION,

Plaintiff,

-v-

CROESUS CAPITAL CORPORATION, ET AL.,

Defendants.

INDEX NO. 603521/99

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

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


Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the parties' stipulation, dated October 6, 2000, wherein plaintiff consented to setting aside the default of defendants Northwest Capital Partners LLC, Eclipse Entertainment Group, Inc., and Liberty Transfer Co., this Court hereby recalls and vacates the order, dated February 26, 2001 (motion sequence no. 003), granting plaintiff's motion for summary judgment as against these defendants on default. Plaintiff's motion for summary judgment against these defendants (motion sequence no. 003) is decided in accordance with the accompanying memorandum decision and order of the Court.

Dated: 03/07/01


WALTER B. TOLUB, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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DABBAH SECURITIES CORPORATION,

Plaintiff,

-against-

Index No. 603521/99

Mtn Seq. No. 003

CROESUS CAPITAL CORPORATION,
NORTHWEST CAPITAL PARTNERS L.L.C.,
ECLIPSE ENTERTAINMENT GROUP, INC.,
and LIBERTY TRANSFER CO.,

Defendants.
-----x

WALTER B. TOLUB, J.:

Plaintiff, Dabbah Securities Corporation ("Dabbah Securities"), moves for summary judgment against defendants Northwest Capital Partners L.L.C. ("Northwest"), Eclipse Entertainment ("Eclipse") and Liberty Transfer Co. ("Liberty").

Dabbah Securities acts as an introducing broker and, inter alia, brokers stock transactions on behalf of its customers. Northwest is a venture capital firm and has a consulting relationship with Eclipse. In that regard, Northwest assists Eclipse with raising funds in the capital and/or lending markets.

On November 10, 1998, defendant Croesus Capital Corporation ("Croesus") executed a margin agreement with Dabbah Securities and its clearing agent, Investec/Ernst & Company ("Ernst") (the "margin agreement"). That agreement, inter alia, obligated Croesus to cover any cost or loss attributed to transactions arising out of its margin account.

Bonn Securities AG Ltd ("Bonn Securities"), a non-party to this action, owns 500,000 shares of Eclipse (the "Eclipse shares"). It authorized Northwest to have issued in Croesus's name a stock certificate for its Eclipse shares (the "Eclipse stock certificate"). In furtherance of that transaction, on January 26, 1999, Croesus and Northwest entered into an agreement whereby Northwest would deliver the Eclipse shares to Dabbah Securities (the "Northwest agreement"). The agreement further provided that if Croesus was unable to arrange for the sale of the Eclipse shares at a mutually satisfactory price within 10 days of January 26, 1999 (i.e., February 5, 1999) Croesus would transfer the Eclipse shares back to Northwest (Opposition Papers, Ex. B).

On or about February 3, 1999, Croesus delivered to Dabbah Securities the Eclipse stock certificate, who in turn delivered the certificate to Ernst to be held on account for Croesus. Croesus instructed Dabbah Securities to sell the Eclipse shares if and when a price between \$0.625 and \$0.75 per share could be obtained.

Subsequently, Ernst submitted the Eclipse stock certificate to the Deposit Trust Corporation (the "DTC") to effectuate the transfer of the Eclipse shares from Eclipse (the "Eclipse shares transfer"). In contemplation of the actual transfer, DTC credited Ernst with the Eclipse shares.

Dabbah Securities was unable to sell the Eclipse shares at the price specified by Croesus. On February 11, 1999, Croesus instructed Dabbah Securities to transfer the Eclipse shares to Croesus's account maintained at Janney Montgomery Scott, Inc. ("Janney Montgomery"), another brokerage firm. Thereafter, Ernst authorized the transfer of the Eclipse shares to Janney Montgomery, who in turn transferred some of the shares to certain third parties.

Meanwhile, in a letter dated February 26, 1999, Bonn Securities instructed Eclipse to place a "Stop Transfer" on the Eclipse stock certificate for the Eclipse shares because Croesus "ha[d] not fulfilled any of its obligations as promised January 26, 1999" and to "demand the return of this [Eclipse stock] certificate so that we may have it reissued" (Opposition Papers, Ex. C). To that end, on March 3, 1999, Northwest notified Croesus that pursuant to the Northwest agreement Croesus was required to return the Eclipse shares because it was unable to sell them by the agreed upon date of February 5, 1999. There was no response. Northwest sent a second notification letter, dated March 9, 1999, demanding the return of the Eclipse shares. In a letter dated March 10, 1999, Croesus stated, inter alia, that it no longer had the Eclipse shares and that they "have been distributed to provide financing for the company" (Id.). In a letter dated March 11, 1999, Northwest reiterated that Croesus was never authorized to negotiate the Eclipse shares, that it was

in violation of the Northwest agreement, and that it must return the shares forthwith (Id.).

While Northwest and Croesus were in dispute, DTC on March 8, 1999 notified Ernst that Liberty, Eclipse's transfer agent, had notified it that a "Stop Transfer" had been placed on the Eclipse shares prior to its completion of the transfer, and, as a consequence, it was rescinding its credit of the Eclipse shares that it had given Ernst. DTC's decision caused Ernst's DTC account to be short given that it had already transferred the Eclipse shares to Janney Montgomery. In other words, Ernst had a negative balance of Eclipse shares.

Ultimately, after commencing an action against Croesus, its principal, John Wells, Eclipse, and Northwest, Ernst was able to eliminate its short position by having the Eclipse shares transferred back into its account (essentially, this transaction had the effect of showing on paper that Ernst never had the Eclipse shares). Ernst thereafter debited Dabbah's Securities' account held at Ernst in the amount of \$26,544.97, representing its costs and losses arising out of the Eclipse transaction.

Dabbah Securities commenced this action to recover that amount. In its first cause of action against Croesus, Dabbah Securities seeks a judgment against it in the amount of \$26,544.97.

The second cause of action against Eclipse and Northwest to seeks to award to Dabbah Securities the Eclipse stock certificate

free of any adverse claims on the ground that Dabbah Securities is a protected purchaser pursuant to UCC § 8-303.

The third cause of action seeks to hold Eclipse liable, pursuant to UCC § 8-401, for wrongfully refusing Ernst's request to register the transfer of the Eclipse shares.

In its fourth cause of action, Dabbah Securities seeks a judicial declaration of the parties' rights to the Eclipse stock certificate.

The fifth cause of action is for an injunction enjoining the transfer of the Eclipse stock certificate.

Dabbah Securities has already obtained a default judgment against defendant Croesus Capital Corporation ("Croesus") for \$28,509.49 (Moving Papers, Ex. C). That default judgment also adjudged that Croesus had no interest in the Eclipse stock certificate. It now seeks to hold the remaining defendants, Northwest, Eclipse, and Liberty (collectively referred to as the "Northwest defendants"), liable as to the remaining causes of action asserted against them.

Dabbah Securities contends that the Northwest defendants should reissue the Eclipse stock certificate in its name because the judgment awards it control over the Eclipse stock certificate.

It misreads the judgment. The judgment did not adjudge that it had control of the Eclipse stock certificate. Instead, the

judgment merely divested Croesus of any interest in the certificate (Moving Papers, Ex. C).

Dabbah Securities next argues that the Eclipse stock certificate or the Eclipse shares should be transferred to it or reissued in its name because it is a protected purchaser pursuant to UCC § 8-303. Section 8-303 reads as follows:

(a) "Protected purchaser" means a purchaser of a certificated or uncertificated security, or of an interest therein, who:

- (1) gives value;
- (2) does not have notice of any adverse claim to the security; and
- (3) obtains control of the certificated or uncertificated security.

(b) In addition to acquiring the rights of a purchaser, a protected purchaser also acquires its interest in the security free of any adverse claim.

Here, the record clearly demonstrates that Dabbah Securities did not have notice of the Northwest agreement (Northwest and Eclipse do not dispute Dabbah Securities' claim that it had no notice of the Northwest agreement and the restrictions that agreement placed on Croesus with respect to the negotiating the Eclipse shares). Indeed, the Eclipse stock certificate itself bore no indication on its face of any transfer restrictions (see, Dabbah Aff., Moving Papers, Ex. A).

Nevertheless, Dabbah Securities has failed to satisfy the remaining two requirements to be deemed a protected purchaser. It has failed to tender any evidentiary proof that it received the Eclipse stock certificate for value. Its reliance on the margin agreement to show value is unavailing because that

agreement merely indicates that the stock certificate would be collateral for any indebtedness arising out Croesus's transactions of its margin account (Dabbah Aff. in Further Support, ¶ 4). Indeed, Dabbah Securities did not proffer any response to the Northwest defendants' demand to "provide evidence that [Dabbah Securities], in fact, paid for the shares" (Nelson Aff., Opposition Papers, ¶ 3).

Assuming arguendo that value was given, Dabbah Securities does not have control over the Eclipse stock certificate. The protected purchaser designation would only be helpful to Dabbah Securities if it had in its possession the Eclipse stock certificate or the Eclipse shares, and it was seeking to retain such possession despite other claims of ownership from third parties. Instead, the record indicates that Eclipse has possession of the Eclipse shares and that Bonn Securities has exercised ownership over the certificate and/or the shares by imposing a "Stop Transfer" restriction on the certificate and the shares. Dabbah Securities makes no claim that Bonn Securities is not the rightful owner of the shares or that it is the only entity that can vacate the restriction.

The issue that remains is whether the Northwest defendants can be liable to Dabbah Securities for its alleged loss. The record demonstrates that there is no direct contractual relationship between the Northwest defendants and Dabbah Securities. Nor is there an indirect contractual relationship

between them through Croesus. Thus, Dabbah Securities must advance another basis upon which to hold the Northwest defendants liable.


Here, Dabbah Securities has failed to proffer any evidentiary proof that the Northwest defendants were aware of Croesus' instruction to Dabbah Securities to transfer from Ernst to Janney Montgomery the Eclipse shares. Indeed, Croesus' scheme unraveled on March 8, 1999 when DTC notified Ernst that a "Stop Transfer" had been placed on the Eclipse shares and that DTC would be rescinding the previous credit to the Ernst account of the Eclipse shares. Thus, absent any evidentiary proof that the Northwest defendants were part of Croesus' scheme, Dabbah Securities has no basis to hold these defendants liable for its losses arising out of Croesus' conduct.

Accordingly, based on the foregoing, that branch of Dabbah Securities' motion for a judicial declaration is granted to the extent of declaring that it is not entitled to an ownership interest in the Eclipse stock certificate or the Eclipse shares. For these same reasons, those branches of its motion for summary judgment on its remaining causes of action against the Northwest defendants is denied. Upon searching the record, and pursuant to CPLR 3212(b), the Court grants the Northwest defendants summary judgment dismissing the complaint. Upon service of a copy of this order with notice of entry, the Clerk of the Court is

directed to enter judgment dismissing the complaint against the Northwest defendants.

This constitutes the decision and order of the Court.

Dated: 02/07/01



HON. WALTER B. TOLUB, J.S.C.