

Teevee Toons, Inc. v Prudential Securities Credit Corp., LLC

2005 NY Slip Op 30411(U)

September 14, 2005

Supreme Court, New York County

Docket Number: 603116/02

Judge: Herman Cahn

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

PRESENT: HERMAN CAIN
Justice

PART 49

0603116/2002

TEEVEE TOONS, INC.
vs
PRUDENTIAL SECURITIES

SEQ

INDEX NO. _____
MOTION DATE 3/2/04
MOTION SEQ. NO. 1
MOTION CAL. NO. 009

_____ motion to/for _____

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

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE**

FILED
SEP 16 2005
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/14/05

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK IAS PART 49

-----X
TEEVEE TOONS, INC., TVT CATALOG :
ENTERPRISES, LLC, TVT MUSIC, INC., WAX TRAX!
RECORDS, INC., TVT MUSIC II, LLC, WHITE RHINO : Index No. 603116/02
MUSIC II, LLC, DUTCHMASTAS II, LLC,

Plaintiffs,

- against -

PRUDENTIAL SECURITIES CREDIT CORP., LLC,

Defendant.

FILED

SEP 16 2005

NEW YORK
COUNTY CLERK'S OFFICE

-----X
Herman Cahn, J.

Defendant secured creditor moves (seq. no. 009) to dismiss the first cause of action of the amended complaint, for violation of UCC 9-610 (commercially reasonable disposition of collateral), and for breach of its Loan Agreement with plaintiffs debtors, dated February 19, 1999, CPLR 3211 (a) (7). Defendant further moves to dismiss the punitive damages claims asserted in both causes of action in the amended complaint, *id.*

Background:

The factual background of this matter is fully set forth in the court's decision and order, dated October 3, 2003, and preceding decisions; as well as in the court's decisions and orders in a companion action entitled *Prudential Securities Credit Corp., LLC v Teevee Toons, Inc.* (index No. 603112/02). Familiarity therewith is presumed. The facts are repeated here only to the extent necessary for the within disposition.

This action was commenced shortly after Prudential's commencement of the companion case, which sought foreclosure of its security interest in collateralized assets of the

TVT entities due to an outstanding indebtedness of more than \$16,000,000.00. By decision and order in the companion case, dated September 23, 2003, the court granted Prudential's motion for summary judgment and directed a turn-over of the collateralized assets (*aff'd* 5 AD3d 226 [1st Dept 2004]). The assets, consisting of copyrighted and trademarked musical works, have remained in Prudential's possession, and under its supervision and control, since that time. No public or private sale of the assets has occurred.

The TVT entities commenced this action, claiming various breaches by Prudential of the parties' February 19, 1999, loan-related agreements,¹ and related causes of action. By decision and order dated October 3, 2003, the court granted Prudential's motion to dismiss the original complaint with leave to replead one surviving cause of action, alleging that Prudential breached Loan Agreement § 2.9 by failing to remit certain Cash Collateral and Lockbox deposits to the TVT entities (*aff'd* 8 AD3d 134 [1st Dept 2004]).

The TVT entities served an amended complaint repleading the foregoing cause of action, as a second cause of action, and adding a first which essentially asserts that Prudential has no right to retain the collateral indefinitely without any foreseeable plan to dispose of it, in a commercially reasonable manner, and, thereby, extinguish the debt to the extent of the proceeds on such disposition. The claim is succinctly put in paragraph 10 of the amended complaint (Miller Aff. Ex. F): the UCC "duty to act in a commercially reasonable manner requires Prudential to proceed with the required disposition without undue delay."

The essence of Prudential's contrary position, forming the basis of this motion to

¹ The parties entered into three such agreements: a Loan Agreement, Security Agreement, and Management Agreement.

dismiss, is summed up in its counsel's letter to plaintiffs' counsel, dated November 19, 2003:

"Prudential may dispose of the Collateral at any time and in any way it sees fit" (Riely Aff. Ex. D at 2). The court disagrees, for the reasons that follow.

Discussion:

The statutory motif of the UCC is imbued with the recognition that both the creditor and the debtor possess rights vis-a-vis collateral, even after default and lawful seizure by the creditor. The creditor's duty to employ commercially reasonable liquidation measures is a prime example. Section 9-610 provides, in pertinent part:

Disposition after default. After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing.

Commercially reasonable disposition. Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. . . .

(UCC 9-610 [a], [b].) Sections 9-625 and 626 provide specific remedies for a secured creditor's failure to comply with its post-seizure responsibilities, vis-a-vis the collateral, such as liability for "loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing" (*id.*, 9-625 [b]). A secured creditor's right to pursue a deficiency judgment against the debtor² may be impaired if it cannot demonstrate that its liquidation efforts were sufficient (*id.*, 9-626 [a] [2]; *see also, e.g., id.*, 9-207 [enumerating rights and duties of a secured creditor in possession], - 611 [creditor's duty to furnish pre-liquidation notice to debtor]).

The debtor's protections under the UCC, vis-a-vis the collateral, exist regardless

² Prudential possesses post-liquidation recourse rights against the TVT entities, per section 3.6 of the Security Agreement (Miller Aff. Ex. H).

of whether the loan or security agreement vests the creditor with title to the collateral, post-seizure (UCC 9-202, -619 [c]). A debtor is without capacity to waive various UCC protections, including those “which deal with disposition of collateral” (*id.*, 9-602 [g]). Section 8.2 of the parties’ Security Agreement (Miller Aff. Ex. H) acknowledges that Prudential’s disposition of the assets must be “in compliance with any mandatory requirements of Applicable Law”

The upshot of the foregoing is plain. Prudential may not dispose of the Collateral at any time and in any way it sees fit. Modern commercial law places certain responsibilities on the creditor and vests the debtor with certain rights vis-a-vis the collateral, even post-default and seizure. Prudential has been in possession of the collateral for nearly two years. During this time, it has been exploiting those assets, lawfully, as permitted by the court’s decision and order in the companion case, dated June 7, 2004 (*affd* 16 AD3d 192 [1st Dept 2005]).³ However, it must proceed to liquidate or manage the assets in a reasonable time.⁴

Indeed, the Official Comment to UCC 9-610 expressly cautions that a secured party’s right to remain in seizure of collateral, without disposition, is not indefinite:

Time of Disposition. This Article does not specify a time period within which a secured party must dispose of collateral. This is consistent with this Article’s policy to encourage private dispositions through regular commercial channels. It may, for example, be prudent not to dispose of goods when the market has collapsed. Or, it might

³ The referenced decision and order, *inter alia*, entitled Prudential to retain a manager for the assets.

⁴ Prudential is not restricted to selling the assets to a third party. UCC 9-610 (c) recognizes a secured creditor’s right to acquire ownership of the assets itself, through public or private disposition. It is also possible that the proper disposition of the assets is to retain a manager to manage them under reasonable terms. However, Prudential has not yet done so; nor has it furnished notification of proposal to accept collateral in full or partial satisfaction pursuant to UCC 9-621. Rather, it continues to hold the assets without conceding satisfaction of any portion of the \$16,000,000.00 debt.

be more appropriate to sell a large inventory in parcels over a period of time instead of in bulk. Of course, under subsection (b) every aspect of a disposition of collateral must be commercially reasonable. This requirement explicitly includes the “method, manner, time, place and other terms.” For example, if a secured party does not proceed under Section 9-620⁵] and holds collateral for a long period of time without disposing of it, and if there is no good reason for not making a prompt disposition, the secured party may be determined not to have acted in a “commercially reasonable” manner. See also Section 1-203 (general obligation of good faith).

(Official Comment 3, McKinney’s Cons Laws of NY, Book 62 1/2, UCC 9-610, at 194 [2002]

[underscoring added].)

To be sure, Prudential, as secured creditor in possession, enjoys discretion with regard to commercial reasonableness. For example, UCC 9-610 (a) recognizes that seized assets might require “preparation or processing” before they can be deemed ready for liquidation (*see also, Bankers Trust Co. v J.V. Dowler & Co., Inc.*, 47 NY2d 128 [a secured creditor is not required to consult the debtor as to its preferences for asset disposition], *rearg denied* 47 NY2d 1012 [1979]; UCC 9-627 [a] [the fact that a greater return might have been achieved is not, standing alone, evidence that the creditor proceeded unreasonably]). Prudential may be able to show that its delay is necessary to maximize asset value for final disposition. Further, if the TVT entities by their own actions, failures to cooperate, threats of litigation or otherwise, prevent Prudential from acting in a way that would be otherwise reasonable, Prudential’s failure to act more quickly may be excused.

However, at this pleading stage, the issue raised in the first cause of action,

⁵ The referenced section details the protocol for a secured creditor’s declaration of acceptance of the collateral in full or partial satisfaction of the debt, known at common law as “strict foreclosure” (4 White & Summers, Uniform Commercial Code § 34-10, at 392-96 [Practitioner’s 5th ed]). This is one of the measures sought in the first cause of action of the amended complaint (Miller Aff. Ex. F ¶ 23).

relating to the commercial reasonableness of the delay, is one of fact which cannot be disposed of on motion (*Barclay's Bank of New York, N.A. v Heady Elec. Co., Inc.*, 174 AD2d 963 [3d Dept], *appeal dismissed* 78 NY2d 1072 [1991]; *Dougherty v 425 Dev. Assocs.*, 93 AD2d 438 [1st Dept 1983]; *National Bank v Gregory*, 85 AD2d 839 [3d Dept 1981]).

Consequently, the motion to dismiss the first cause of action of the amended complaint is denied.

The motion to dismiss the punitive damages claims asserted in the amended complaint is granted. Such damages are only recoverable in cases of "high degree of moral turpitude" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 [1995]) and "to vindicate public rights" (*Colton, Hartnick, Yamin & Sheresky v Feinberg*, 227 AD2d 233, 234 [1st Dept 1996]). Nothing of the sort is present here, involving the foreclosure of Prudential's security interest in the aftermath of plaintiff's default on a substantial commercial indebtedness. If any contractual breach or UCC violation is proven, the remedy must be compensatory – not punitive.

Accordingly, it is

ORDERED that defendant's motion to dismiss the first cause of action of the amended complaint is denied; and it is further

ORDERED that defendant's motion to strike the punitive damages claims asserted in the amended complaint is granted, and the same are hereby stricken; and it is further

ORDERED that the clerk shall enter judgment accordingly.

Dated: September 14, 2005

FILED
SEP 16 2005
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:


J. S. C.