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

PRESENT: Hon. DORIS LING-COHAN, Justice PART 36

NORTH OCEAN VENTURES, INC. formerly known as OCCUNOMIX INTERNATIONAL, INC.,

Plaintiffs

- v -

OCCUNOMIX INTERNATIONAL LLC, WEBSTER BUSINESS CREDIT CORPORATION F/K/A WHITEHALL BUSINESS CREDIT CORPORATION,

Defendants.

INDEX NO. 601788/05
MOTION DATE
MOTION SEQ. NOS. 003, 004
MOTION CAL.NO.

The following papers, numbered 1 to 7 were read on the motions to/for : dismiss complaint.

Papers	Numbered
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1,2,3,4
Answering Affidavits - Exhibits (Memo)	5
Replying Affidavits (Reply Memo)	6,7

Cross Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that the motions are granted, for the reasons set forth below.

Background

Motion sequence numbers 003 and 004 are consolidated for disposition.

Plaintiff, North Ocean Ventures, Inc. (North Ocean), is a New York corporation and former designer and manufacturer of personal safety equipment for workers that sold its assets to defendant OccuNomix International LLC (OccuNomix) in April 2003, pursuant to a written Asset Purchase Agreement (APA). The purchase price was approximately $ 10,440,000, with $9,240,000 paid at closing and the balance due over time as evidenced by certain promissory notes in favor of North Ocean (the Notes). A portion of the purchase price was financed by defendant Webster Business Credit Corporation f/k/a Whitehall Business Credit Corporation (WBCC). As a condition of the WBCC financing, OccuNomix and North Ocean executed a Seller's Subordination

Agreement dated as of April 4, 2003 (the Subordination Agreement).

Section 2.4 of the Subordination Agreement provides, in pertinent part:

> "... until the Senior Debt is paid in full in cash and all commitments of Senior Lender in regard thereto terminated, Junior Creditor shall not, without the prior written consent of Senior Lender, take any Collection Action with respect to the Junior Debt ..."

(Affirmation of Eric S. Horowitz, Esq. in Support of Motion [Horowitz Aff.], Ex. D [Subordination Agreement]). As used in the Subordination Agreement: "Senior Lender" refers to WBCC; "Senior Debt" refers to the obligations of OccuNomix to WBCC; "Junior Creditor" refers to North Ocean; and "Junior Debt" refers to all of the obligations of OccuNomix to North Ocean pursuant to the Notes (*id.*). The Subordination Agreement broadly defines the term, "Collection Action", as follows:

> "(a) to demand, sue for, take or receive from or on behalf of the Borrower or any Guarantor of the Junior Debt, by set-off or in any other manner, the whole or any part of any moneys which may now or hereafter be owing by the Borrower or any Guarantor with respect to the Junior Debt, (b) to initiate or participate with others in any suit, action, or proceeding against the Borrower or any Guarantor to (i) enforce payment of or to collect the whole or any part of the Junior Debt or (ii) commence judicial enforcement of any of the rights and remedies under the Junior Debt Documents or applicable law with respect to the Junior Debt, (c) to accelerate any Junior Debt, (d) to exercise any put option or to cause the Borrower or any Guarantor to honor any redemption or mandatory prepayment obligation under any Junior Debt Document or (e) to take any action to realize upon any Collateral or to exercise any other right or remedy with respect to any Collateral."

Subsequent to the closing of the sale of North Ocean's assets, OccuNomix demanded indemnification from North Ocean pursuant to the APA, asserting that North Ocean induced it to enter into the agreement by misrepresenting, among things, that:

> "No customer or vendor whose annual volume of purchases or sales exceeded $25,000 during Seller's fiscal year ended December 31, 2002 or during the period between such date and the Closing, has informed Seller, Stockholders or any of the officers or directors of Seller that it intends to cease doing business with Seller or materially decrease (in the case of customers) or increase (in the case of vendors) the amount or pricing of the business done with Seller."

(Horowitz Aff., Ex. C [APA], § 3 [r]). By notice dated April 5, 2004, OccuNomix demanded

indemnification from North Ocean, pursuant to APA § 6 (d) (1), in the amount of $ 1,500,000, for damages it claims to have suffered as a result of a misrepresentation by North Ocean that a major customer of the firm, PromoWorx, Inc., had ceased to do business with North Ocean or materially decreased the amount of its business (Horowitz Aff., Ex. E). On or about April 16, 2004, OccuNomix exercised its right pursuant to APA § 6 (g) (i) to set-off the amount of $ 900,000, against the amounts due to North Ocean pursuant to the Notes (*id.*). Nevertheless, OccuNomix did not commence an action against North Ocean concerning its indemnification claim.

On or about May 17, 2005, North Ocean commenced the instant action against OccuNomix, seeking both a declaration that the set-off against the Notes was wrongful and improper, as well as monetary damages in the full amount of the set-off plus increased interest, as provided by the APA (Horowitz Aff., Ex F). By letter dated June 8, 2005, counsel for WBCC advised the attorneys representing North Ocean that it considered the action it had commenced against OccuNomix to be a "Collection Action which is expressly prohibited under the terms of the Subordination Agreement unless WBCC has consented in writing thereto, which it has not done" (Horowitz Aff., Ex. G). In response to this letter, counsel for North Ocean wrote, in a letter dated June 20, 2005, that North Ocean "has no intention of breaching or acting in contravention of the Subordination Agreement, nor does it believe that it has done so. Nonetheless, we will consider amending the complaint to withdraw the claim for damage, leaving only the request for declaratory relief remaining" (Horowitz Aff., Ex. H).

In a letter dated June 24, 2005, counsel for WBCC notified counsel for North Ocean that, even if it were to amend the complaint to withdraw the claim for monetary damages leaving only the claim for declaratory relief, "such an action would continue to violate the clear language of the Subordination Agreement", as the action would still come within the broad definition of a "Collection Action" in section 2.4 of that agreement (Horowitz Aff., Ex. I). Nevertheless, shortly thereafter, North Ocean filed an amended complaint, eliminating the claim for monetary damages and retaining only the claim for declaratory relief (Horowitz Aff., Ex. J).

On or about July 29, 2005, OccuNomix moved for an order, pursuant to CPLR 3211 (a) (1), dismissing the complaint based upon documentary evidence. According to OccuNomix, this action violates the provisions of the Subordination Agreement limiting North Ocean's ability to maintain a "Collection Action" without the written consent of the "Senior Lender", WBCC (Horowitz Aff., Ex. K). In a decision entered April 10, 2006, Hon. Marilyn Shafer of this Court denied the motion, without prejudice to renewal following North Ocean's filing of a supplemental amended complaint joining WBCC as a defendant, pursuant to CPLR 1001 (a). The decision concluded that WBCC is a party necessary to accord complete relief to the existing parties, North Ocean and OccuNomix, as well as a party "who might be inequitably affected by a judgment in the action" (Horowitz Aff., Ex. B). In compliance with the above decision and order, North Ocean served a verified supplemental amended complaint, joining WBCC as a defendant in the action. OccuNomix then renewed its motion pursuant to CPLR 3211 (a) (1) to dismiss the supplemental amended complaint based upon documentary evidence. WBCC has also moved for the same relief. For the reasons discussed below, this Court grants defendants' motions to dismiss the complaint.

Discussion

OccuNomix bases its motion to dismiss pursuant to CPLR 3211 (a) (1) on the clear language of the Subordination Agreement, which prohibits North Ocean from bringing a "Collection Action" without the written consent of WBCC, the "Senior Lender". As the court explained in *Minority Equity Capital Co. v Jackson* (798 F. Supp. 200, 202 [SD NY 1992]):

> "The purpose of a subordination agreement is [to] set out the relative position of lenders with respect to their right to receive payments from the borrower. The use of subordination agreements is common where the senior creditor, usually a bank, is interested in taking a low risk with respect to repayment. The subordinate creditor, however, usually a non-bank lending institution, takes a higher risk with respect to repayment in the hope that the yield will be greater" (parenthetical supplied).

(*see also Comptroller of the State of New York v Gards Realty Corp.*, 68 AD2d 186, 189-190 [2d Dept 1979]).

The Subordination Agreement broadly defines the term "Collection Action" to go beyond a

claim for money damages and to include an action to "(i) enforce payment of or to collect the whole or part of the Junior Debt or (ii) commence judicial enforcement of any of the rights and remedies under the Junior Debt Documents or applicable law with respect to the Junior Debt" (Subordination Agreement, § 1). OccuNomix is, thus, correct that this definition of a "Collection Action" includes the declaratory judgment claim asserted by North Ocean with respect to the propriety of the indemnification demanded by OccuNomix and the set-off it exercised pursuant to the APA, in the sum of $ 900,000, against the amount due to North Ocean under the Notes. WBCC has twice declined to give its written consent to North Ocean's action, even after it agreed to eliminate the claim for monetary damages, and has now moved to dismiss the action for the same reasons as OccuNomix.

In opposition to the motions to dismiss, North Ocean has submitted an affirmation from its attorney asserting, among other things, that "the Bank [referring to WBCC] is attempting to exercise a virtual veto power over an indemnification claim against OccuNomix that has nothing to do with the Subordination Agreement, and nothing to do with the Bank, couching its veto disingenuously as an alleged refusal to consent to a 'collection action' allegedly arising under the Subordination Agreement" (Affirmation of Richard B. Corbin, Esq. in Opposition [Corbin Aff.], at ¶ 13 [parenthetical supplied]). North Ocean's attorney further speculates that "the statute of limitations relevant to any suit against OccuNomix for its blatant breach of the APA is running, and it is conceivable that OccuNomix and the Bank could indefinitely conspire to deprive [North Ocean] of any remedy until the statute has expired" (id., at ¶ 17 [parenthetical supplied]).

OccuNomix emphasizes the general principle governing contract interpretation that:

> "... when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or to vary the writing ...".

(*W.W.W. Assocs., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *see also R/S Assocs. v New York Job Dev. Auth.*, 98 NY2d 29, 33 [2002]; *Reiss v Financial Performance Corp.*, 97 NY2d 195, 198-

199 [2001]). Further, a court, when construing a contract, may not add or eliminate terms, thereby making a new contract for the parties under the guise of interpreting their writing (*see Reiss*, 97 NY2d at 199). Accordingly, this Court will enforce the terms of the Subordination Agreement, by dismissing North Ocean's action, which has not received the written consent of WBCC.

Even, assuming for the sake of argument, that this Court were to consider the extrinsic evidence proffered by North Ocean's attorney, this would not defeat defendants' motions. If this Court were to treat defendants' motions as summary judgment motions, after giving the parties notice, as required in CPLR 3211 (c), it would still be guided by the principle that "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat such motions (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]). Therefore, the conclusory, speculative assertions in the affirmation by North Ocean's counsel are insufficient to raise triable issues of fact to defeat a motion for summary judgment (*see GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 968 [1985]; *Wehringer v Helmsley Spear, Inc.*, 91 AD2d 585 [1st Dept 1982]), *affd* 59 NY2d 688 [1983]).

Accordingly, it is

ORDERED that defendants' motions to dismiss the complaint are granted, and the Clerk is directed to enter judgment dismissing the complaint, with costs; and it is further

ORDERED that, within, 30 days of entry, defendants shall serve upon plaintiff a copy of this decision and order, together with notice of entry.

This constitutes the Decision and Order of the Court.

Dated: December 11, 2006

ENTER:
Doris Ling-Cohan, JSC

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