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

PRESENT: Hon. MICHAEL D. STALLMAN PART 7

Justice

TRINITY BUI and TRINITY FINANCING INVESTMENTS CORP.,

Plaintiffs,

- v -

INDUSTRIAL ENTERPRISES OF AMERICA, INC. and JOHN MAZZUTO,

Defendants.

INDEX NO. 117290/05

MOTION DATE 1/11/07

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

The following papers, numbered 1 to 8 were read on this motion for summary judgment

	PAPERS NUMBERED
Notice of Motion— Affidavits — Exhibits	1-2
Answering Affidavits — Exhibits	3
Replying Affidavits	4-5
Supplemental Affidavit, Letter	6-7
Supplemental Affirmation	8

Cross-Motion: ☐ Yes X No

Upon the foregoing papers, it is ordered that defendants' motion for summary judgment is decided in accordance with the annexed memorandum decision and order.

FILED
APR 24 2007
NEW YORK
COUNTY CLERK'S OFFICE

MICHAEL D. STALLMAN J.S.C.

Dated: 4/18/07

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: _____ J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

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TRINITY BUI and TRINITY FINANCING INVESTMENTS CORP.,

Index No. **117290/05**

Plaintiffs,

- against -

Decision and Order

INDUSTRIAL ENTERPRISES OF AMERICA, INC. and JOHN MAZZUTO,

Defendants.

----------X

HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiffs seek to recover payments and interest due under a series of promissory notes given by defendant Industrial Enterprises of America, Inc. (ILNP),[1] a publicly traded Nevada corporation formerly known as Advanced Bio/Chem, Inc. Defendant John Mazzuto is the president and chief executive officer of ILNP. Defendants move for summary judgment on their counterclaim, for a declaration that certain promissory notes, referred to as Notes #5, #6, #7 and #9, can no longer be converted to shares of ILNP stock, and that ILNP's liability under these notes is limited to the payment of the principal owed.

BACKGROUND

Plaintiff Trinity Bui is the president of plaintiff Trinity Financing Investments Corp. (TFIC) Plaintiffs loaned $500,000 to ILNP, evidenced by four promissory notes payable to Bui, in the amounts of $100,000, $25,000, $25,000, and $300,000, maturing in 2007. The relevant terms of

[1]The parties refer to this defendant by its former ticker symbol to maintain consistency with the prior court papers and to avoid confusion.

each promissory note are identical. The notes are convertible into shares of common stock of ILNP, provided, however, that upon conversion, Bui would not become owner of 10% or more of ILNP's voting securities. If ILNP were to default on payment of any interest when due and payable, then Bui has the right to accelerate the unpaid principal balance on the notes. Amendments to the promissory notes state that ILNP may not prepay all or any part of the principal of the notes.

Defendants admit that ILNP did not pay interest on the notes when due. By letter dated December 2, 2005, plaintiffs demanded payment in full of all principal, interest and penalties due on the notes. On December 13, 2005, plaintiffs commenced this action asserting causes of action seeking to recover the principal and interest due.

By letter dated January 30, 2006, plaintiffs' counsel demanded that ILNP "pay off all loans from Trinity Bui and TFIC in 48 hours. If not, we will notify all relevant parties, the SEC, the NASD and commence an action for a TRO and tortious interference against ILNP, Mr. Mazzuto and all others involved."

On February 8, 2006, plaintiffs amended the complaint. With respect to the four promissory notes, the amended complaint purports to seek only the interest due on the notes, with unspecified damages. By letter dated March 9, 2006, defendants' counsel tendered payment in full of the principal due on the four notes, and interest due in a combination of cash and common stock. According to defendants, ILNP borrowed funds by issuing additional convertible notes to a venture capital fund.

However, by letter dated March 13, 2006, plaintiffs accepted only payment of the interest, and rejected payment of the principal, claiming that ILNP may not prepay the principal due on a $500,000 note. By letter dated March 22, 2006, plaintiffs sent notice to defendants that Bui was

exercising her option to convert three of the four promissory notes, for a total of $200,000, into shares of common stock. However, by an email dated March 27, 2006, plaintiffs' counsel then stated that Bui decided not to convert those notes after all.

The Court held a conference on defendants' motion for summary judgment on January 11, 2007. At the conference, plaintiffs stated that, after the action was commenced, the price of ILNP's stock soared nearly 370% over the stock price at the time action was commenced, and so any conversion rights would now be worth several million dollars.

DISCUSSION

The standards for summary judgment are well settled.

> "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action."

Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986)(internal citations omitted).

Defendants argue that plaintiffs cannot elect to accelerate payment on the notes while asserting the right to convert the notes into shares, especially after defendants borrowed funds to satisfy the debt. According to defendants, payment and conversion of the notes are mutually exclusive, alternative performance by ILNP under the notes. Defendants therefore conclude that ILNP's tender of payment following acceleration extinguished plaintiffs' right to convert the notes. Defendants maintain that acceleration of the notes amounts to a waiver of the right of conversion.

In opposition, plaintiffs deny that they accelerated payment on the notes. Plaintiffs argue that

they did not waive their right to convert the notes into shares because the notes contain non-waiver provisions, and they expressly reserved their rights in letters to defendants dated December 2, 2005 and January 30, 2006. In any event, plaintiffs claim that they were entitled to revoke the acceleration prior to ILNP's tender of payment. According to plaintiffs, they revoked acceleration of the payment of principal when they amended the complaint on February 6, 2006, which purportedly withdrew plaintiffs' demand for payment of the principal. In a supplement affidavit, Bui also claims that, after filing the first amended complaint (but before the March 9, 2006 letter from defendants), Bui spoke to Mazzuto and

> "frequently and expressly told him that I was no longer demanding payment of principal $500,00 and, instead, intended in time to convert all the notes into ILNP shares. [Bui] also pleaded with him to permit [her] to exercise the millions of warrants from time to time, but only so many that [her] ownership interest remained below 10%." Bui Suppl. Aff. ¶ 27.

Defendants have established a prima facie case for summary judgment in their favor on their counterclaim. Defendants admit that ILNP did not pay interest on the promissory notes when due. See Mazzuto Aff. ¶ 16. Contrary to plaintiffs' argument, plaintiffs clearly accelerated payment on the notes by demanding full payment of the principal, interest, and penalties due on the notes. See Mazzuto Aff., Exs 10, 11.

Once plaintiffs determined that ILNP had breached the obligations under the promissory notes, plaintiffs were required to elect either to continue to perform the agreement and give notice to the other side, or to terminate their agreements with defendants. Albany Med. Coll. v Lobel, 296 AD2d 701, 702 (3d Dept 2002); Capital Med. Sys. v Fuji Med. Sys., U.S.A., 239 AD2d 743, 746 (3d Dept 1997). Plaintiffs, as the non-breaching parties, must choose between these two inconsistent rights, which constitutes an election, not a waiver. 13 Williston, Contracts, § 39:32 (4th ed). "Thus,

even an express reservation of rights or remedies is generally ineffective once the party put to an election following a breach of the contract makes his or her choice." 13 Williston, Contracts, § 39:33 (4th ed). Plaintiffs must "make an election, and cannot 'at the same time treat the contract as broken and as subsisting. One course of action excludes the other.'" Inter-Power of New York Inc. v Niagara Mohawk Power Corp., 259 AD2d 932, 934 (3d Dept 1999) quoting Strasbourger v Leerburger, 233 NY 55, 59 (1922).

In accelerating payment due on the promissory notes, plaintiffs clearly elected not to continue receiving regular payments of the interest, with an option to convert the notes into shares. It is undisputed that defendants attempted to tender payment of all amounts due on the notes. See Mazzuto Aff., Ex 12. Tender of full payment to plaintiffs after payment became due discharges defendants from all subsequent liability for interest, costs and attorneys fees. UCC § 3-604 (1).

That is not to say that plaintiffs may not revoke the acceleration. However, a threshold issue arises as to whether plaintiffs' actions amount to a waiver of the acceleration of payment. "A waiver is the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it .... Such a waiver must be clear, unmistakable and without ambiguity." Professional Staff Congress-City Univ. of New York v New York State Pub. Employment Relations Bd., 7 NY3d 458, 465 (2006).

Here, the first amended complaint was not a clear, unmistakable waiver. The amendment replaced the dollar amount of the principal due with "damages," thus leaving it unclear in the amended complaint as to whether plaintiffs were no longer seeking repayment of the principal due. See Howe Reply Affirm., Ex 18.

As to Bui's alleged conversations with Mazzuto, defendants argue that her supplemental

affidavit is insufficient to raise a triable issue of fact as to whether Bui orally waived the acceleration of payment, not only because of the circumstances under which the plaintiffs offered the affidavit, but also because of its self-serving, conclusory nature. Defendants also argue that the terms of the notes do not permit an oral waiver, because the notes provide that notices must be given in writing. This argument is without merit. "[A] contracting party may orally waive enforcement of a contract term notwithstanding a provision to the contrary in the agreement." Bank Leumi Trust Co. of New York v. Block 3102 Corp., 180 AD2d 588, 590 (1st Dept 1992).

However, whether Bui's supplemental affidavit raises a triable issue of oral waiver is not so clearly resolved. On the one hand, no deposition of the parties had been completed before this motion was submitted, and the parties all acknowledged at the conference that Bui and Mazzuto have spoken to each other directly notwithstanding the fact that they are both represented by counsel. On the other hand, courts have insisted that the defense of an oral waiver of acceleration of the debt must meet a "threshold of believability" to raise a triable issue of fact as to waiver. 20 East 17th Street LLC v 4 M Dev. Co., 246 AD2d 341, 342 (1st Dept 1998); Berkeley Fed. Bank & Trust v 229 E. 53rd St. Assocs., 232 AD2d 315 (1st Dept 1996); Chemical Bank v Broadway 55-56th St. Assocs., 220 AD2d 308, 309 (1st Dept 1995). These cases involved motions for summary judgment in mortgage foreclosure actions, where the defendant's bare assertion of oral waiver was not enough to create an issue of fact. New York State Urban Development Corp. v Marcus Garvey Brownstone Houses, Inc., 98 AD2d 767, 770 (2d Dept 1983).

Because summary judgment is premature due to outstanding depositions, and because summary judgment is a drastic remedy, the Court denies defendants' motion. Although the circumstances of the proffer of Bui's supplemental affidavit suggest credibility issues, it cannot be

said that, on the record before this Court, that Bui is incredible as a matter of law. Defendants also argue that plaintiffs may not revoke the acceleration because of a material change in defendants' position in reliance on the acceleration. See 1A Anderson on the Uniform Commercial Code (3d ed) § 1-208:97; see also Federal Natl. Mtge. Assn. v Mebane, 208 AD2d 892, 894 (2d Dept 1994). However, discovery on this issue is necessary, because it is not clear when ILNP borrowed funds to repay the debt in full, and whether that occurred before Bui allegedly had conversations with Mazzuto.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is denied.

This opinion constitutes the decision and order of the Court.

Dated: April 18, 2007
New York, New York

ENTER:

J.S.C.

MICHAEL D. STALLMAN
J.S.C.

FILED
APR 24 2007
COUNTY CLERK'S OFFICE
NEW YORK