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

PRESENT: HERMAN CAHN PART 49

Justice

INDEX NO. 603151/03

JOHN M. VAN DEVENTER

Plaintiff

- v -

MOTION DATE 12/18/06

MOTION SEQ. NO. 022

CS SCF MANAGEMENT LTD.

MOTION CAL. NO

Defendant.

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

FILED

JUL 05 2007

NEW YORK
COUNTY CLERK'S OFFICE

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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

June 29, 2007

Hon. Cahn
J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

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JOHN M. VAN DEVENTER, JAMES R. CLARK, and C2C CONSULTANTS, LTD.,

Plaintiffs,

-against-

Index No. 603151/03

CS SCF MANAGEMENT LIMITED, CREDIT SUISSE FIRST BOSTON, CREDIT SUISSE FIRST BOSTON (USA), CS CAPITAL PARTNERS, LTD., CS STRUCTURED CREDIT FUND, LTD., CREDIT SUISSE FUND ADMINISTRATION LIMITED, and QUEENSGATE BANK AND TRUST COMPANY, LTD.,

Defendants.

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Herman Cahn, J.:

In motion sequence number 022, plaintiff C2C Consultants, Ltd. (C2C) moves for partial summary judgment on the eighth cause of action for breach of a loan agreement, CPLR 3212 (e).

The underlying facts and procedural history of this complex commercial action have been fully set forth in the court's prior decisions on the parties' numerous motions and will not be repeated here, except as necessary for clarification.

The court notes that this is C2C's second motion for partial summary judgment as to liability on the eighth cause of action asserted in the first amended complaint. By decision and order dated September 21, 2005, the court denied the prior motion on the ground that genuine triable issues of material fact existed and that the motion was then premature inasmuch as issue had not yet been joined and discovery had not yet been conducted regarding the negotiation, creation, interpretation, terms, and/or performance of the pledged account agreement (the PAA) and the strategic consulting agreement executed in 1999 (the 1999-SCA).

In the eighth cause of action, C2C seeks from defendants CS SCF Management Limited (the Manager), Credit Suisse First Boston (CSFB), Credit Suisse First Boston (USA), CS Capital Partners, Ltd. (CS Capital), and CS Structured Credit Fund, Ltd. (the Credit Fund) (collectively, the CS defendants) and Credit Suisse Fund Administration Limited[1] (the Administrator) compensatory damages equal to the $1,500,000 principal of a loan, together with default interest, pursuant to a loan agreement. The loan agreement was executed on January 31, 2002, by C2C, as the lender, the Credit Fund, as the borrower, and the Manager. The loan agreement authorized the Credit Fund to draw down a maximum of $1,500,000 from an account then maintained in C2C's name at defendant Queensgate Bank and Trust Co., Ltd. (the pledged account), established pursuant to the terms of the PAA. The loan agreement further authorized the Credit Fund to use the funds only to provide debt financing to Resource Partners Group Limited (RPG), a Credit Fund asset, by subscribing for RPG loan notes.

The Credit Fund subsequently withdrew the funds from the pledged account and invested them in RPG in exchange for unsecured "A" loan notes.

The RPG loan agreement requires the Credit Fund to repay the loan upon the happening of certain events, which include the partial or full repayment of the RPG notes or the sale (termed a "Realisation" at loan agreement § 5.1), of the Credit Fund's interest in RPG. On July 22, 2003, RPG redeemed RPG loan notes held by the Credit Fund, in full (see Jul. 22, 2003, Redemption Notice). In February 2004, the Credit Fund sold its remaining interest in RPG to nonparty Vision Capital for approximately $1,898,000.

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[1]By order dated September 23, 2005, this court dismissed defendant Credit Suisse Fund Administration Limited from this action.

The Credit Fund did not repay any portion of the loan or accrued interest, nor did it notify C2C that the above mentioned events had occurred. Instead, the Credit Fund authorized RPG's directors to use the proceeds of the redemption to purchase RPG "B" preference shares.

In the loan agreement, C2C reserved the right to demand immediate repayment of the full balance of the loan, together with unpaid and accrued interest, at any time after a default by the Credit Fund of any of its obligations under the loan agreement, whether or not the default was beyond the Credit Fund's control.

C2C alleges that the Credit Fund has defaulted on its contractual obligations by failing to pay the loan principal or interest, to use best efforts to ensure such repayment, and to notify C2C that it had received a redemption payment from RPG and, later, sold its RPG equity interest. C2C argues that, therefore the Credit Fund is obligated to repay the entire balance due, together with default interest calculated at 15% per annum, compounded daily.

C2C now seeks to recover the $1,500,000 principal amount, together with default interest totaling $708,904.11, as of September 14, 2006, together with default interest accruing after that date, from the CS defendants, as jointly and severally liable under the loan agreement, on the ground that the Credit Fund's contractual obligation to pay has been triggered.

In opposition, the CS defendants contend that C2C lacks standing to demand repayment of the loan because the monies should be paid, if at all, to the pledged account and because C2C is not ultimately entitled to the monies in that account. The CS defendants contend that, therefore, the court should search the record and grant summary judgment in their favor on the eighth cause of action, citing CPLR 3212 (b).

A loan agreement must be interpreted pursuant to the same principles that govern all

contracts (In re Luis Elec. Contr. Corp., 149 BR 751, 758 [Bankr EDNY 1992]; see Otto Roth & Co., Inc. v Gourmet Pasta, Inc., 277 AD2d 293, 295 [2d Dept 2000]). Where the intent of the parties is expressed by the clear and unambiguous terms of a written contract, the contract should be enforced as written (American Express Bank Ltd. v Uniroyal, Inc., 164 AD2d 275, 277 [1st Dept 1990], appeal denied 77 NY2d 807 [1991]).

The documentary evidence conclusively demonstrates that C2C has the right to demand repayment of the subject loan, together with interest, from the Credit Fund. The loan agreement defines C2C as the "lender" and the Credit Fund as the "borrower" (see Loan Agr., ¶¶ 1, 2). Further, the loan agreement requires the Credit Fund to repay C2C a proportional amount of the loan principal from any amounts received by the Credit Fund from RPG, "whether in repayment of the RPG Loan Notes or from any Realisation, in the following order: (a) first, to the Lender (in repayment of the Loan) and . . . (b) second, to the Borrower until it has been repaid its aggregate debt and equity investment in RPG" (id., § 6.1). A "Realisation" is defined as "a sale, flotation or other disposition of RPG, whether in whole or in part" (id., § 5.1). The loan agreement, thus, requires that, in the event of repayment of the RPG loan notes or a realisation by sale of RPG, the Credit Fund must apply any amounts received to repayment of the loan in priority to other payments or obligations.

In addition, the loan agreement authorizes C2C, and no one else, to demand immediate repayment in full upon the Credit Fund's default. The parties to the loan agreement expressly reserve to C2C

> the right to demand immediate repayment of the full amount of the Facility (together with all unpaid accrued interest and any other sums then due under this Agreement) at any time after the occurrence of the

> Event of Default (for whatever reason and whether within or beyond the Borrower's or the Lender's control and whether or not any Event of Default is continuing).

(Id., § 12.)

However, contrary to C2C's pleadings and initial arguments, nothing in any of the written agreements indicates that any of the remaining CS defendants agreed to be jointly and severally liable for the Credit Fund's payment obligations under the loan agreement, as C2C tacitly recognized in its reply brief in which it sought relief solely against the Credit Fund. Therefore, the branch of the motion for relief against the CS defendants other than the Credit Fund is denied.

The record conclusively demonstrates that the Credit Fund is obligated to repay the principal amount, together with interest, to the pledged account. There is no dispute that the Credit Fund drew down $1,500,000 from the pledged account pursuant to section 4 of the loan agreement and that two events triggering the Credit Fund's contractual repayment obligation occurred. The first event occurred on July 22, 2003, when RPG redeemed the Credit Fund's RPG loan notes in full (see Jul. 22, 2003, Redemption Notice). Pursuant to section 6 of the loan agreement, upon such redemption, the Credit Fund must apply the funds it receives to repayment of the loan principal. The second event occurred on February 19, 2004, when the Credit Fund sold its remaining interests in RPG to nonparty Vision Capital for approximately $1,898,000. The sale constituted a realisation as defined by the contract and again triggers the Credit Fund's obligation to pay C2C interest on the loan from the realisation proceeds within 10 business days after the event (see RPG Loan Agr., §§ 5.1, 5.2).

Despite the occurrence of these events, the Credit Fund did not pay any portion of the

principal or interest due. Either of these payment failures constitutes an event of default as defined by schedule 2 of the loan agreement.[2]

The occurrence of the defaults also triggered the Credit Fund's contractual obligation to immediately notify C2C of the event. The loan agreement requires the Credit Fund to "notify the Lender of the occurrence of any Event of Default or Potential Event of Default immediately upon becoming aware of it" (id., § 11.3). Failure to notify similarly constitutes an event of default under schedule 2 of the loan agreement. The Credit Fund does not deny C2C's allegations that the Credit Fund failed to timely notify C2C of RPG's redemption of the loan notes or of the sale of its equity interest in RPG and that C2C served a notice of default dated April 2, 2002, and repeatedly requested detailed notifications of the note redemption and equity sale.

The Credit Fund's multiple defaults entitled C2C to demand immediate payment of the accelerated unpaid balance, pursuant to section 12 of the loan agreement. Despite receipt of such demand, the Credit Fund has failed to make any payments under the loan agreement.

Further, the Credit Fund's payment defaults also entitle C2C to demand payment of

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[2]Schedule 2 of the loan agreement provides that:

> Each of the following events and circumstances shall be an Event of Default:
>
> (a) The Borrower fails to pay any sum payable under this Agreement when due, . . .
>
> (b) The Borrower fails duly and punctually to perform or comply with any of its obligations under this Agreement and, in the case only of a failure which in the opinion of the Lender is capable of remedy and which is not a failure to pay money, does not remedy that failure to the Lender's satisfaction within 7 days (or such longer period as the Lender may approve) after receipt of written notice from the Lender requiring it to do so.

interest at the default rate, as specified in the loan agreement. The default interest is set at the rate of 15% per annum, compounded daily, both before and after judgment (id., § 13).

Although C2C is entitled to demand payment from the Credit Fund, the relevant contract provisions conclusively demonstrate that the parties intended that the monies be deposited into the pledged account.

Pursuant to the 1999-SCA, the CS defendants retained C2C as a strategic consultant to provide advice to the Manager in exchange for consulting fees payable to C2C by the Manager in accordance with a specified formula (see 1999-SCA, § 7). In certain circumstances (delineated in the amended and restated fund management agreement (the 2000-FMA) executed on March 14, 2000, by the Manager, the Credit Fund, and CS Capital, and in the 1999-SCA), C2C is required to repay a portion of the consulting fees to the Manager. The 1999-SCA required C2C to fund an account pledged to the Manager containing $6,000,000, as collateral to secure its potential debt to the Manager. The 1999-SCA also specified the circumstances when the monies in the pledged account could be released to C2C (see id., § 7.3 [d]).

The parties agreed that funds in the pledged account could be loaned to the Credit Fund for investment in RPG. The loan agreement provides that "for purposes of the Pledge Agreement, the Manager and the Borrower expressly approve the Loan as an investment of Collateral" (RPG Loan Agr., § 15.8; see PAA, § 3 [b]) held in the pledged account. The PAA at section 2 defines collateral as "(a) the Pledged Account, (b) all contract rights, claims and privileges in respect of the Pledged Account, including all rights, claims, and privileges of [C2C] to any deposit account, and (c) all amounts now or hereafter deposited in the Pledged Account."

The parties further agreed that, if the RPG loan were repaid, any repayment would be

made to the pledged account. The loan agreement provides that "[e]ach payment by the Borrower under this Agreement shall be made . . . to the Lender's account [the pledged account]" (id., § 9). The loan agreement also provides that the Manager and the Borrower "acknowledge that should any part of the Loan not be repaid to the Lender, it shall be considered a reduction of the Collateral, and to the Consultant Excess Amount (as defined in the Pledged Account)" (id., § 15.8). In fact, in calculating the consultant excess amount, the Administrator deducted the $1,500,000 RPG loan principal from the amount of the consultant excess amount. Thus, clearly the parties intended the Manager, not C2C, to assume the risk of nonpayment of the RPG loan to the pledged account by agreeing that there would be a reduction in its security interest in the account.

For these reasons, the Credit Fund must deposit the outstanding principal and default interest due into an escrow account set up and maintained at nonparty Citibank, N.A., pursuant to court order dated November 14, 2005, as C2C recognized in its reply brief (see C2C Reply Memo of Law, Oct. 10, 2006, at 5).

The parties next dispute whether C2C is entitled to the immediate release of the monies in the pledged account and whether C2C or the Manager is ultimately entitled to all, or a portion, of these monies pursuant to the provisions of the 1999-SCA, the 2000-FMA, and the PAA regarding payment of the clawback amount and consultant excess fee. The parties have raised these issues in greater detail in motions designated sequence numbers 027 and 031. Therefore, the court refers the parties to its decisions and orders on those motions.

Accordingly, it is

ORDERED that motion sequence number 022 is granted to the extent of granting partial

summary judgment as to liability on the eighth cause of action asserted in the first amended complaint, in favor of plaintiff C2C Consultants, Ltd., and against defendant CS Structured Credit Fund, Ltd., as follows: defendant is directed to deposit $1,500,000 million, together with default interest as prayed for and allowable by law at the rate of 15% per annum, compounded daily, from the first date of default, until entry of judgment, as calculated by the Clerk of the Court, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, into the escrow account maintained at nonparty Citibank, N.A., pursuant to court order dated November 14, 2005; and it is further

ORDERED that the causes of action remaining in the first amended complaint shall continue.

Dated: June 29, 2007

ENTER:

J.S.C.