

AJW Partners LLC v Bootie Beer Corp.

2008 NY Slip Op 31320(U)

May 1, 2008

Supreme Court, New York County

Docket Number: 0600377/2007

Judge: Herman Cahn

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

PRESENT: Cahn

PART 49

Justice

Index Number : 600377/2007
AJW PARTNERS LLC
vs.
BOOTIE BEER CORP.
SEQUENCE NUMBER : # 001
SUMMARY JUDGMENT

INDEX NO. 600377-07
MOTION DATE #001
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

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 foregoing papers, it is ordered that this motion

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

FILED

MAY 08 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/1/08

Alan Cahn
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
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 AJW PARTNERS, LLC, AJW OFFSHORE,
 LTD., AJW QUALIFIED PARTNERS, LLC,
 and NEW MILLENNIUM CAPITAL
 PARTNERS II, LLC,
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 Plaintiffs,
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 -against-
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 BOOTIE BEER CORPORATION,
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 Defendant.
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Index No. 600377/07

FILED
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 NEW YORK

Herman Cahn, J.

Plaintiffs move for summary judgment, CPLR 3212, to be awarded various sums plus interest with regard to notes they purchased from defendant. Plaintiffs also move for an order that defendant marshal all of its assets in which plaintiffs have a security interest, and turn over a list of those assets and their location to plaintiffs.

BACKGROUND

Plaintiffs are various investment funds that maintain offices in New York.

Defendant Bootie Beer Corporation brews, markets and distributes malt beverages. On April 14, 2007, after this action was commenced, defendant changed its name to TMT Capital Corporation.

Plaintiffs entered into a Securities Purchase Agreement with defendant, dated September 19, 2006, pursuant to which they agreed to purchase certain "Callable Secured Convertible Notes" (the "Notes") from defendant. Plaintiffs together purchased notes with a principal

balance of \$1.3 million. The Notes were allocated as follows: (1) AJW Qualified Partners, LLC purchased \$390,000; (2) New Millennium Capital Partners II, LLC purchased \$13,000; (3) AJW Partners, LLC purchased \$117,000; and (4) AJW Offshore, Ltd. purchased \$780,000.

The Notes provided for an interest rate of 6% per annum, however, the default interest rate is 15% per annum, accruing daily.

Each of the Notes required defendant to file a registration statement with the Securities and Exchange Commission (the "SEC") and to obtain effectiveness of the registration statement within 120 days following the closing date for the issuance of the Notes, *i.e.* by January 17, 2007. The Notes further provided that defendant's failure to do so would result in defendant being deemed in default under the Notes' terms.

As a condition to their purchasing the Notes, plaintiffs obtained security interests in defendant's assets pursuant to a "Security Agreement" and "Intellectual Property Security Agreement" (the "Security Agreements"). Section 2 of the Security Agreement states that:

As an inducement for the [plaintiffs] to purchase the Notes . . . [defendant] hereby, unconditionally and irrevocably, pledges, grants and hypothecates to the [plaintiff], a continuing security interest in, a continuing first lien upon, an unqualified right to possession and disposition of and a right of setoff against . . . all of the [defendant]'s right, title and interest of whatsoever kind and nature in and to the Collateral.

(Schechter Aff, Ex K § 2.)

In addition, the Security Agreements provide that if an event of default occurred, plaintiffs were entitled to take possession of the Collateral and Intellectual Property as agreed in Section 6(a) thereof. Section 4(a) of the Security Agreements lists among the Events of Default "[t]he occurrence of an Event of Default (as defined in the Notes) under the Notes." Plaintiffs

thereafter duly perfected their security interests in defendant's collateral.

Plaintiffs allege that the registration statement did not become effective, as required in the Notes, and that this was defendant's fault. Plaintiffs informed defendant of their decision to accelerate the Notes by letter dated January 30, 2007.

Plaintiffs plead four breach of contract claims arising from defaults under plaintiffs' respective Notes and seek an order to direct defendant to marshal, in preparation for foreclosure, all of its assets in which plaintiffs have a security interest and to deliver promptly to plaintiffs a list of those assets and their location.

DISCUSSION

A motion for summary judgment, CPLR 3212, should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). The motion should be denied if the opposing party presents evidence establishing that there is an issue of fact remaining. *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980).

Plaintiffs contend that they are entitled to summary judgment for all sums due under the Notes because defendant defaulted on the Notes, and there are no issues of material fact as defendant concedes that it never obtained effectiveness of the registration statement as required.

In order to succeed on a breach of contract claim, plaintiff must provide evidence of: (1) a valid and enforceable contract; (2) its performance of the contract; (3) breach by the other party; and (4) damages. *Terwilliger v Terwilliger*, 206 F3d 240, 245-46 (2d Cir 2000); *see also Furia v Furia*, 116 AD2d 694, 695 (2d Dep't 1986).

Plaintiffs argue that they have established all the elements of a breach of contract claim

against defendant because: (1) defendant does not dispute that it entered into the Securities Purchase Agreement with plaintiffs and issued the Notes to them; (2) defendant concedes that plaintiffs performed their obligations by purchasing the Notes; (3) Article 3.3 of the Notes required that defendant obtain effectiveness of the registration statement and defendant concedes it did not do that; and (4) therefore, plaintiffs have been damaged.

Defendant, on the other hand, argues that summary judgment is inappropriate here because there are genuine issues of material fact, including a dispute over its reliance on plaintiffs' representations in the Notes that it would not enter short sales within two years, yet defendant alleges that plaintiffs were planning on doing just that. Defendant contends that plaintiffs entered into the agreements with defendant and in direct contravention of their representations, engaged in short sales of defendant's stock and attempted to exceed the trading restrictions contained in the Notes. However, although the allegations of short sales are made in a conclusory way, no factual allegations are set forth.

Defendant contends that, since there has been no discovery to date, it has not had the opportunity to investigate plaintiffs' alleged fraudulent scheme to short sell defendant's stock prior to exercising conversion rights under the Securities Purchase Agreement, which caused defendant's defaults pursuant to the underlying agreements. Defendant maintains that summary judgment should be denied because courts have routinely denied such a motion where facts necessary to oppose the motion may exist, but are within the knowledge of the moving party.

Integrated Logistics Consultants v Fidata Corp., 131 AD2d 338 (1st Dep't 1987).

Since plaintiffs have demonstrated that there are no issues of material fact remaining and defendant has not provided evidentiary proof to rebut plaintiffs' prima facie showing, plaintiffs

are entitled to summary judgment. They have established the elements of a breach of contract claim, which claims are not disputed.

While a liquidated damages provision appears in the Registration Rights Agreement, which provides a remedy for defendant's failure to obtain effectiveness, that provision is irrelevant to the relief available pursuant to the Notes. The provision states that if defendant did not obtain effectiveness of the registration statement within 105 days, defendant would make certain payments as partial relief for the damages "by reason of any such delay in or reduction of their ability to sell the Registrable Securities (which remedy shall not be exclusive of any other remedies available . . .)" (Fleming Aff, Ex C.) The obligations pursuant to the Notes are separate and distinct, especially because they provide different deadlines and the provision in the Registration Rights Agreement acknowledged that this was a partial, non-exclusive remedy.

Defendant's contention that plaintiffs had a scheme to short sell in violation of the agreements, which caused defendant to default, is unavailing here as there does not appear to be any facts to adequately support this statement.

The motion for summary judgment is granted.

Accordingly, it is

ORDERED that summary judgment is granted in favor of plaintiff AJW Partners against defendant in the amount of \$176,527.20, plus interest at the rate of 15% per annum from July 1, 2007; and it is further

ORDERED that summary judgment is granted in favor of plaintiff AJW Offshore against defendant in the amount of \$1,176,848.40, plus interest at the rate of 15% per annum from July

1, 2007; and it is further

ORDERED that summary judgment is granted in favor of plaintiff AJW Qualified against defendant in the amount of \$588,424.20, plus interest at the rate of 15% per annum from July 1, 2007; and it is further

ORDERED that summary judgment is granted in favor of plaintiff New Millennium against defendant in the amount of \$19,614.14, plus interest at the rate of 15% per annum from July 1, 2007; and it is further

ORDERED that the branch of the motion seeking to have defendant marshal all of its assets in which plaintiffs have a security interest, and turn over a list of those assets and their location to plaintiffs, is denied. Such relief may be sought after entry of judgment; and it is further

ORDERED that the clerk enter judgment accordingly.

Dated: May 1, 2008

ENTER:



J.S.C.

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