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

PRESENT: HON. RICHARD B. LOWE, III Justice

PART 52

Platform XE-R LLC

INDEX NO. 603197/07

MOTION DATE 6/30/08

- v -

MOTION SEQ. NO. 001

MOTION CAL. NO.

Lancia Group LLC

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

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
NOV 24 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/24/08

HON. RICHARD B. LOWE, III
J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 56

X

PLATFORM XE-R, LLC,

Plaintiff,

INDEX NO. 603197/07

-against-

MOTION SEQ. NOS. 001 and 002

LANCIER GROUP, LLC and ARCHE MASTER FUND, L.P.,

Defendants.

X



**Hon. Richard B. Lowe, III:**

Motion sequence numbers 001 and 002 are consolidated for disposition. This case stems from a dispute between plaintiff Platform XE-R, LLC (Platform) and defendants Lancier Group, LLC (Lancier) and Arche Master Fund, L.P. (Arche), over Lancier's use of notes of a non-party company to purchase collateral that secured Platform's notes. In motion sequence number 001, Lancier moves for summary judgment, pursuant to CPLR 3212, (1) to dismiss Platform's claim that Lancier improperly bid with notes of a non-party company; and (2) to dismiss Platform's request for injunctive relief to restrain Lancier from disposing of the collateral. In motion sequence number 002, Arche moves for summary judgment, pursuant to CPLR 3212, to dismiss Platform's request for injunctive relief to restrain Arche from disposing of the collateral. Platform opposes both motions and cross-moves, pursuant to CPLR 3025 (b), for leave to amend the complaint.

## BACKGROUND

Platform was formed as an operating entity to conduct the business of a non-party company XE-R, LLC (XE-R), which, in turn, is a joint venture between non-parties XE Capital

Management, LLC (XE Capital) and R 2004, LLC.

To finance its business activities, Platform sold 15% senior secured notes (Platform notes) to several purchasers, including Arche, pursuant to a note purchase agreement, dated April 15, 2005 (the Note Purchase Agreement) (Ross Aff., exhibit A). At the same time, Platform also entered into a security agreement (the Security Agreement) with the note purchasers and J.P. Morgan Chase Bank, N.A. (J.P. Morgan Chase), as the collateral agent (Ross Aff., exhibit B). Pursuant to the Security Agreement, Platform's collateral (the Collateral) apparently consisted of all of Platform's assets. At some point prior to July 18, 2007, the Bank of New York Trust Company, N.A. (the Bank of New York or the Collateral Agent) became the attorney-in-fact for J.P. Morgan Chase with respect to the Security Agreement.

On or about June 15, 2007, July 16, 2007, and July 18, 2007, Arche advised Platform that it considered Platform to be in default of the Note Purchase Agreement, for failure to provide Platform's consolidated annual financial statements for 2006. Arche declared that, pursuant to the Note Purchase Agreement's acceleration clause, all of the Platform notes were immediately due and payable.

By letter dated July 18, 2007, the Bank of New York requested that Platform deliver the Collateral to it, and it appears that Platform complied (*see* Leighton Aff., dated April 2, 2008, exhibit I). By letters dated July 19, 2007, the Bank of New York notified Platform of its intention to sell the Collateral, pursuant to section 10 of the Security Agreement, at a public sale on August 20, 2007, and provided Platform with a Notice of Public Foreclosure Sale, setting procedures and terms of the foreclosure sale (Ross Aff., exhibits G and H). Platform did not object to the terms of the foreclosure sale.

Lancier contends that prior to the foreclosure sale, it acquired from Arche the XE-R note (the XE-R note) in the aggregate amount of $31,950,833.00 and the Platform notes. Lancier did not register the purchase of any of the notes.

The public foreclosure sale of Platform's Collateral took place as scheduled. Terence Leighton (Leighton), a managing director of XE Capital, represented Lancier at the foreclosure sale and bid $257,021,887.00 worth of notes and debt securities owned by Lancier (Ross Aff., exhibit I). Lancier was the only potential bidder at the foreclosure sale, and the Bank of New York's representative accepted its bid. Lancier claims that it delivered the Platform notes and the XE-R note in full satisfaction of its bid. Platform admits that the Collateral Agent delivered to it the Platform notes and the XE-R note as proceeds of the foreclosure sale.

Pursuant to a security agreement dated August 20, 2007, Arche made a loan to Lancier secured by Lancier's assets, which included the Collateral (the Arche loan) (Leighton Aff., dated May 20, 2008, exhibit A). The loan, due in August 2009, is owned by Arche's wholly owned subsidiary. Arche represents that neither it nor its subsidiary retained any rights in the Collateral, other than in their capacity as the secured parties to the Arche loan.

By letter dated September 5, 2007, counsel for Platform wrote to counsel for Lancier acknowledging that "Lancier owns all of the Collateral formerly owned by Platform, and Platform has no interests in the Collateral . . . ." (Dubowy Aff., exhibit A).

In its original complaint, Platform alleges that, pursuant to the Security Agreement, Lancier's bid for an amount in excess of the balance due under the Platform notes had to be made in cash, and that paying with the XE-R note was legally insufficient and commercially unreasonable (Leighton Aff., dated April 2, 2008, exhibit A). Accordingly, in its first cause of

action against Lancier only, Platform seeks $31,950,833.00, which is the difference between Lancier's bid of $257,021,887.00 and the aggregate amount of the Platform notes of $225,071,054.00. In its second cause of action against both Lancier and Arche, Platform seeks injunctive relief, requesting that both defendants be restrained from disposing of the Collateral, because of Lancier's alleged failure to complete the purchase of the Collateral in a commercially reasonable manner, and Platform's belief that Arche may have retained rights in the Collateral.

Both Arche and Lancier move for summary judgment, pursuant to CPLR 3212, to dismiss Platform's claims against them. Platform opposes both motions and cross-moves, pursuant to CPLR 3025 (b), for leave to amend the complaint.

**DISCUSSION**

**Platform's Cross Motion to Amend the Complaint**

The court will first address Platform's cross motion to amend its complaint. Although leave to amend a pleading is freely granted, "an examination of the underlying merits of the proposed causes of action is warranted" (*Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 116 [1st Dept 1998]; *see also Davis & Davis v Morson*, 286 AD2d 584, 585 [1st Dept 2001] ["leave to amend will be denied where the proposed pleading fails to state a cause of action . . . or is palpably insufficient as a matter of law . . . ."). A party seeking leave to amend pleadings must "allege facts legally sufficient to support its proposed pleading" by way of an affidavit of merit and evidentiary proof (*Non-Linear Trading*, 243 AD2d at 117).

Platform's proposed amended complaint alleges that Lancier is controlled by Arche and that defendants failed to provide to Platform documentation evidencing the transfer of the Platform notes and the XE-R note from Arche to Lancier, which, Platform claims, was not an

arm's-length transaction (*see* proposed amended complaint, ¶¶ 20-22). The proposed amended complaint further states that Lancier never registered the purchase of the XE-R note with XE-R, as required by the XE-R note purchase agreement (*id.*, ¶¶ 18-19). On these facts, Platform alleges in its first cause of action that, pursuant to the Security Agreement, the portion of Lancier's bid at the foreclosure sale that was in excess of the balance due under the Platform notes, or $31,950,833.00, had to be made in cash (*id.*, ¶¶ 26-30). Platform claims that Lancier's payment with the XE-R note, instead, was "legally insufficient and commercially unreasonable" and demands that both defendants pay it this amount in cash.

In its second cause of action, Platform alleges that Lancier had no rights in the notes it tendered at the foreclosure sale, because the transfer of the notes from Arche to Lancier was not registered with either Platform or XE-R (*id.*, ¶ 36). Platform avers that Arche may have retained rights in the Collateral (*id.*, ¶ 39). Therefore, Platform contends that Lancier's purchase of the Collateral was not done in a commercially reasonable manner and seeks $31,950,833.00 in damages from both defendants (*id.*, ¶ 35, ad damnum clause).

In support of Platform's cross motion, Mark E. Ross, Platform's manager, contends that section 10 of the Security Agreement, which provides that a secured party "'may apply against the purchase price [of the Collateral] the indebtedness secured hereby owing to it,'" refers to Platform notes, not the XE-R note (Ross Aff., ¶¶ 24-25, exhibit B, § 10 [d]). Ross states that the XE-R note is valueless, and that Leighton was aware of this fact when he bid at the foreclosure sale (*id.*, ¶¶ 26-27). Additionally, Ross states that Platform's counsel, who was present at the foreclosure sale, could not object to Leighton's bid because Leighton did not specify with what notes and debt securities he was bidding (*id.*, ¶ 33, exhibit I). Furthermore, Ross claims that

defendants failed to provide documents evidencing transfer of the notes from Arche to Lancier (*id.*, ¶ 31). Therefore, Ross alleges that a transfer of notes from Arche to Lancier was "a sham transaction," rendering Lancier's purchase of the Collateral commercially unreasonable (*id.*, ¶ 34).

**First Cause of Action**

Section 10 of the Security Agreement, on which Ross and Platform rely, provides that "[u]pon . . . sale or other disposition [of the Collateral], a receipt by the Collateral Agent for the purchase price will be *a sufficient discharge to the purchaser* for the purchase money . . . ." (*id.*, exhibit B, the Security Agreement, § 10 [e] [emphasis added]). The Security Agreement further states that "[a]ny purchaser of the Collateral at any sale or other disposition thereof pursuant to this Section 10 will, upon any such purchase, acquire good title to the Collateral so purchased . . . , and [Platform] will warrant and defend the title of such purchaser against all claims arising by, through or under [Platform]" (*id.*, § 10 [f]).

It is well settled that a contract whose language is "clear, unequivocal and understandable," is "enforced without resort to extrinsic evidence" (*Non-Linear Trading*, 243 AD2d at 114 [citing and quoting *Federal Deposit Ins. Corp. v Herald Sq. Fabrics Corp.*, 81 AD2d 168, 180 (2d Dept 1981) (internal quotation marks omitted); *see also West, Weir & Bartel v Mary Carter Paint Co.*, 25 NY2d 535, 540 [1969]).

The plain meaning of section 10 (e) of the Security Agreement is that Platform obligates itself to discharge any purchaser of the Collateral, whose purchase the Collateral Agent, the Bank of New York, accepts. Furthermore, pursuant to section 10 (f), Platform agrees to see to it that such purchaser has good title to the Collateral, free from any claims, including those by Platform

itself. Therefore, once the Collateral Agent accepted Lancier's payment in Platform and XE-R notes, Platform's claims against Lancier, whether with respect to the notes' actual value or the way that Lancier acquired them, are barred by sections 10 (e) and (f) of the Security Agreement.

Additionally, Platform itself wrote to Lancier, in reliance on the Collateral Agent's representation, that "Lancier owns all of the Collateral formerly owned by Platform, and Platform has no interests in the Collateral . . . ." (Dubowy Aff., exhibit A). This statement by Platform properly follows the terms of the Security Agreement, which absolve the purchaser of the Collateral of any liability, and guarantee that it has good title to the Collateral (*see* Security Agreement, §§ 10 [e], [f]).

With respect to section 10 (d) of the Security Agreement, contrary to Platform's argument, its unambiguous meaning is that it permits a secured party to pay for the Collateral with Platform notes, but it does not restrict the means of payment to Platform notes alone (Ross Aff., exhibit B, § 10 [d]). Additionally, Platform failed to object to the terms of the foreclosure sale set by the Collateral Agent and does not dispute now that Lancier's payment with the XE-R note complied with those terms. At the foreclosure sale, nothing prevented Platform's counsel from questioning Leighton about the specifics of Lancier's bid. Accordingly, neither the Security Agreement nor the terms of the foreclosure sale required Lancier to pay cash instead of the XE-R note (*see West, Weir & Bartel*, 25 NY2d at 540). Therefore, the evidentiary proof submitted by Platform actually shows that Platform is precluded from making any claims against Lancier and that Lancier did not violate the terms of the Security Agreement.

Platform alleges that the foreclosure sale was not commercially reasonable as defined by New York Uniform Commercial Code (UCC), § 9-610 (b) (*see* proposed amended complaint, ¶¶

23-32). The UCC provides that

> "[a] disposition of collateral is made in a commercially reasonable manner if the disposition is made: (1) in the usual manner on any recognized market; (2) at the price current in any recognized market at the time of the disposition; or (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition"

(*see* UCC § 9-627 [b]).

Here, the Bank of New York gave Platform adequate advance notice of, and published in the media, the method and terms of the disposition of the Collateral, which took place in the form of a public auction sale attended by all interested parties (Leighton Aff., dated April 2, 2008, exhibits J-L, O). Platform does not challenge the manner of the Collateral's disposition or adequacy of the price. Platform's only contention is that Lancier was supposed to pay cash, as opposed to the XE-R note, for the amount in excess of the value of the Platform notes. Platform, however, failed to contradict Lancier's argument that payment for the collateral with a note of a company closely related to a debtor conforms with reasonable commercial practices. Accordingly, the totality of the circumstances surrounding the foreclosure sale indicates that it was conducted in a commercially reasonable manner (*see e.g. DeRosa v Chase Manhattan Mtge. Corp.*, 10 AD3d 317, 322 [1st Dept 2004]).

Platform's reliance on the Bankruptcy Code to challenge the commercial reasonableness of the sale is unavailing, since the foreclosure sale here is not governed by the terms of the Bankruptcy Code. Equally unavailing is Platform's reliance on *Federal Home Loan Mtge. Corp. v Appel* (137 P3d 429, 431 [Idaho 2006]) to provide a definition of a "credit bid," as used in the Security Agreement and the notice of public foreclosure sale. The court in *Federal Home* expressly limited its definition to the circumstances of that case, governed by the laws of Idaho.

Additionally, Lancier's payment with the XE-R note was not a "credit bid," but rather a bid pursuant to the terms of the foreclosure sale that permitted a purchaser to "tender debt securities issued by . . . [a] member of [Platform's] managing member . . . against the purchase price . . . ." (Ross Aff., exhibit H, notice of public foreclosure sale). Accordingly, the court finds no evidence that the disposition of the Collateral was done in a commercially unreasonable manner.

Furthermore, as Lancier argues, it, as purchaser, had no duty to ensure that the sale was conducted in a commercially reasonable manner. UCC imposes such duty on a secured party (*see* UCC 9-610 [a], [b], 9-625 [a]). Therefore, the Bank of New York, as an agent of the secured parties, had the duty, and Platform's allegation of commercial unreasonableness and claim for damages should be directed against it, not against Lancier or Arche (*see* UCC 9-625 [a]).

Accordingly, the first cause of action of Platform's proposed amended complaint as against Lancier is devoid of merit (*see Non-Linear Trading Co.*, 243 AD2d at 117).

With respect to Arche, the first cause of action in the proposed amended complaint does not articulate any ground for a claim against Arche (*see* proposed amended complaint, ¶¶ 23-32). Indisputably, Arche did not participate in the foreclosure sale and did not pay for the Collateral with the XE-R note. Platform does not allege that Arche violated the terms of the Security Agreement or any other agreement between the parties (*id.*). All of Platform's allegations are directed solely at Lancier. Accordingly, Platform's first cause of action as against Arche is devoid of merit and fails to state a cause of action (*see Non-Linear Trading Co.*, 243 AD2d at 117; *see also Davis & Davis v Morson*, 286 AD2d at 585).

**Second Cause of Action**

Platform's primary contention is that Lancier's failure to register the transfer of the XE-R

note with XE-R invalidates the use of the note to pay for the Collateral (*see* Lancier's Rule 19-a statement, ¶ 35, and Platform's Rule 19-a response, ¶ 35 [Platform does not challenge the propriety of Lancier's bidding at the foreclosure sale in the Platform notes]). The XE-R note itself provides only that a new note is to be issued to a new note holder, and that "[p]rior to due presentment for registration of transfer, [XE-R] may treat the person in whose name th[e] [n]ote is registered as the owner hereof for the purpose of receiving payment and for all other purposes . . . ." (Ross Aff., exhibit K, form of note, at 1-2). The XE-R note purchase agreement similarly provides that XE-R shall keep a register of the holders of its notes and explains the procedure for issuance of new notes to new holders (*see* Ross Aff., exhibit K, §§ 13.1, 13.2). Neither the XE-R note itself, nor the XE-R note purchase agreement, places an obligation on any particular party to register the transfer of the XE-R note (*id.*). Accordingly, Lancier's or Arche's failure to register the transfer of the note with XE-R did not violate any provision in the XE-R note purchase agreement. Therefore, Lancier was not prevented from paying for the Collateral, in part, with the XE-R note. For the same reason, as Lancier argues, a proper remedy for its failure to register the transfer of the XE-R note is merely to have the new owner register the note with XE-R, not to unravel the foreclosure sale or award monetary damages to Platform.

As to Platform's allegation that Arche retained an interest in the Collateral, Arche submitted proof that its only interest in the Collateral is that of a secured party (*see* Leighton Aff., dated May 20, 2008). Arche's outstanding loan to Lancier, on which Lancier has not defaulted, is secured by the Collateral (*see* Leighton Aff., dated May 20, 2008, ¶¶ 3-4). Arche's potential interest in the Collateral, which may materialize only if Lancier defaults on its loan, is too tenuous to support Platform's claim against Arche. Further, even if Arche had retained any

interest in the Collateral, it would not alter the outcome because it does not affect Platform, which, in any event, no longer has an interest in the Collateral. Indeed, Platform has not even suggested that Arche would have been precluded from bidding at the foreclosure sale.

In order to counter Platform's unsubstantiated allegation that the note transfer between Arche and Lancier was "a sham transaction," Arche offered to disclose necessary documentation regarding this transfer if Platform executed a non-disclosure agreement (Nesser Aff., ¶¶ 2-4, exhibit A). Evidently, Platform did not respond to Arche's offer (*id.*, ¶ 4) and provides no explanation for why Arche's proposal was not acceptable. Additionally, Arche provided a bill of sale and assignment, dated August 20, 2007, which supports its contention that the transaction between it and Lancier was legitimate (*see* Reed Aff., exhibit A). Furthermore, the issue of legitimacy of the transfer between Arche and Lancier is largely irrelevant, since no party is disputing title to the Platform notes or the XE-R note. Therefore, Platform's allegations in the second cause of action of its proposed amended complaint are contradicted by the provisions of the XE-R note, the XE-R note purchase agreement, and sworn statements by Leighton, Irene Dubowy, one of Lancier's attorneys, and Kevin Reed, one of Arche's attorneys, which Platform failed to rebut. Accordingly, the second cause of action of the proposed amended complaint is devoid of merit as well, and, as a result, Platform's cross motion to amend the complaint is denied (*Non-Linear Trading Co.*, 243 AD2d at 118; *see also Davis & Davis*, 286 AD2d at 585).

**Lancier's and Arche's Motions for Summary Judgment**

Since Platform's cross motion to amend its complaint is denied, the court now considers Lancier's and Arche's motions for summary judgment as they pertain to Platform's original complaint.

To obtain summary judgment, the movant must tender evidentiary proof that would establish the movant's cause of action or defense sufficiently to warrant judgment in his or her favor as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[T]o defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact" (*id.* [citing CPLR 3212 (b)] [internal quotation marks omitted]).

Platform's complaint asserts two causes of action. The first one, against Lancier only, alleges that Lancier violated the Security Agreement by paying for the Collateral, in part, with the XE-R note instead of cash, and seeks an order requiring Lancier to pay Platform $31,950,833.00 in cash (*see* Leighton Aff., dated April 2, 2008, exhibit A, ¶¶ 18-25). The second cause of action alleges that Arche may have retained rights in the Collateral and seeks injunctive relief restraining both defendants from disposing of the Collateral (*see id.* ¶¶ 26-34).

In response to Arche's motion, Platform withdrew its second cause of action as against both defendants in its entirety (*see* Platform's mem. of law, at 2, n 1 ["Platform elects not to pursue a cause of action for an injunction, preferring instead to recover damages from the defendants"]). Accordingly, Platform withdrew its only claim in the original complaint as against Arche, and, therefore, Arche's motion is granted.

**Lancier's Motion**

In support of its motion, Lancier offers a sworn affidavit of Leighton, dated April 2, 2008, who, as previously discussed, describes Lancier's involvement in the foreclosure sale (*see* Leighton Aff., dated April 2, 2008, ¶¶ 17-21). Lancier's arguments, which were previously addressed, are that (1) the Security Agreement did not prohibit payment for the Collateral with the XE-R note, (2) Lancier's bid with the XE-R note fully complied with the terms of the

foreclosure sale set by the Bank of New York, (3) Lancier was merely a bidder at the foreclosure sale, and (4) Platform's claims should be directed against the Collateral Agent.

In opposition, Platform offers the affidavit of Mark E. Ross, who states that Leighton bid with the valueless XE-R note, and that Leighton's bid "chilled prospective bidders from bidding" (*id.*, ¶¶ 26, 27).

Platform argues that issues of material fact exist as to whether the sale of the Collateral was conducted in a commercially reasonable manner, because (1) the Security Agreement precluded Lancier from paying for the Collateral with the XE-R note, (2) Lancier failed to register with XE-R that it was a new holder of the XE-R note, and (3) Arche failed to provide to Platform documentation of sale of the notes to Lancier.

First, as previously discussed, even if all of Platform's allegations against Lancier were true, the Security Agreement, on which Platform relies, explicitly precludes Platform from making any claims against Lancier, as purchaser of the Collateral (Ross Aff., exhibit B, §§ 10 [e], [f]). Second, the court already addressed Platform's arguments – with respect to the form of payment under the Security Agreement, section 10 (d); Lancier's failure to register with XE-R the transfer of its note; allegations that the XE-R note lacks value and that the transfer between Arche and Lancier was "a sham transaction" – and found them to be without merit. Third, as the transcripts of the foreclosure sale conclusively demonstrate, Lancier was the only potential bidder and submitted the only bid (*see* Ross Aff., exhibit I, Leighton Aff., dated April 2, 2008, exhibit O). Accordingly, Lancier's bid could not have had have any negative effect on any other potential bidders. Consequently, the first cause of action is dismissed.

Finally, since Platform withdrew its claim for injunctive relief as against both defendants,

the second cause of action is dismissed. Accordingly, Lancier's motion is granted (*see S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 343 [1974]).

**CONCLUSION**

For the foregoing reasons, it is hereby

**ORDERED** that plaintiff Platform XE-R, LLC's cross motion (motion sequence 001) for leave to amend the complaint is denied; and it is further

**ORDERED** that defendant Lancier Group, LLC's motion for summary judgment (motion sequence 001) is granted; and it is further

**ORDERED** that plaintiff Arche Master Fund, L.P.'s motion for summary judgment (motion sequence 002) is granted; and it is further

**ORDERED** that the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

**ORDERED** that the Clerk is directed to enter judgment accordingly.

Dated: November 24, 2008

FILED
NOV 24 2008
COUNTY CLERK'S OFFICE
NEW YORK

**ENTER:**

J.S.C.

HON. RICHARD B. LOWE, III