

U.S. Bank Natl. Assn. v Imax Corp.

2009 NY Slip Op 30960(U)

April 21, 2009

Supreme Court, New York County

Docket Number: 604255/07

Judge: Charles E. Ramos

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

PRESENT: CR Justice

PART 13

Index Number : 604255/2007

U.S. BANK NATIONAL

VS.

IMAX CORPORATION

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

NYS SUPREME COURT
RECEIVED
APR 23 2009
MOTION SUPPORT OFFICE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 IS DECIDED IN
ACCORDANCE WITH THE DECISION FILED UNDER
MOTION SEQUENCE # 003

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1412).

JD

Dated: _____ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

CR

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION
-----X

U.S. BANK NATIONAL ASSOCIATION, in its
capacity as Indenture Trustee and not in
its individual capacity,

Index# 604255/07

Plaintiff,

-against-

IMAX CORPORATION, and
THE CATALYST FUND LIMITED PARTNERSHIP II,

Defendants.

-----X
CATALYST FUND LIMITED PARTNERSHIP II,

Cross-Claim Plaintiff,

-against-

IMAX CORPORATION,

Cross-Claim Defendant.

-----X

Charles Edward Ramos, J.S.C.:

In motion sequence 003, defendant cross-claim plaintiff Catalyst Fund Limited Partnership II (Catalyst) moves, pursuant to CPLR 3212, for summary judgment against defendant cross-claim defendant, IMAX Corporation (IMAX). In motion sequence 004, IMAX moves, pursuant to CPLR 3212, for summary judgment against Catalyst and to grant the declaratory relief requested by plaintiff U.S. Bank National Association (U.S. Bank or Trustee). For purposes of efficiency, both motions will be addressed here.

Background

IMAX is a Canadian corporation involved in producing, distributing, and presenting large-screen films in over 400 theaters worldwide. In December 2003, IMAX issued \$160 million

in debt through a series of Senior Notes (the "Notes"). The Notes are governed by an indenture dated December 4, 2003 between IMAX, U.S. Bank, and a number of named guarantors (the "Indenture").

IMAX, pursuant to the terms of the Indenture, was to file its annual report for 2006 with the Securities and Exchange Commission (SEC) at the end of March 2007. Due to comment letters and an informal investigation by the Division of Corporate Finance of the SEC into IMAX's financial statements, the filing of that annual report ("SEC filing" or the "filing") would be delayed, and IMAX risked default under the terms of the Indenture that contains a filing deadline. To avoid this potential default, in April 2007, IMAX solicited consents (the "solicitation" or "consent solicitation"¹) from holders of the Notes. Through those consents, a majority of IMAX's note holders waived the default and approved a supplemental indenture that extended the deadline for IMAX's filing of its annual report. Catalyst, a note holder, opposed the waiver. IMAX filed its annual report in July 2007.

In December 2007, U.S. Bank, in its capacity as Trustee, filed this action against IMAX and Catalyst seeking a declaration that (1) no default had occurred; and (2) that Catalyst lacks authority to rescind votes of other note holders and standing to

¹ Section 513 of the Indenture permits IMAX to solicit waivers of a default before it ripens into an "Event of Default" by a consent solicitation, whereby a majority of note holders consent to the waiver. Following an "Event of Default," a holder of more than 25% of Notes can declare all sums immediately due.

pursue legal action under the Indenture.² Catalyst filed cross-claims against IMAX alleging fraud, bad faith, and breach of contract, and seeks a declaration that IMAX is in default.

In furtherance of those claims, Catalyst alleges that the consent solicitation was tainted by a false statement made by IMAX in the memorandum distributed to note holders. Consequently, Catalyst argues that the extension of the deadline to file its annual report on the basis of a waiver of default should be invalidated. In addition, Catalyst alleges that IMAX filed its annual report with several deficiencies. Upon these grounds, Catalyst seeks to set aside the consents submitted by the majority of note holders, rescind the supplemental indenture, and accelerate the maturity of \$160 million in Notes.

IMAX seeks summary judgment dismissing Catalyst's cross-complaint on the grounds that the breach of contract, bad faith, and fraud claims are factually and legally deficient.

The Motions for Summary Judgment

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact as to the claim or claims at issue. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d

² U.S. Bank concedes that Catalyst has standing to pursue cross-claims against IMAX because U.S. Bank has initiated this action in accordance with the terms of the Indenture.

851, 853 [1985]).

Once the prima facie showing has been made, the party opposing a motion for summary judgment bears the burden of "produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact" *Amatulli v Delhi Constr. Corp.*, 77 NY2d 525 (1991).

Discussion

Catalyst seeks summary judgment on two grounds. First, Catalyst argues that the consent solicitation was fraudulent (and therefore, ineffective) due to IMAX's knowing misrepresentation in its solicitation that it had already acquired 67% of the needed consents, a fact included in the solicitation to help garner a majority of consents from note holders. See Richard L. Gelfond³ Co-Chairman, Co-Chief Executive Officer and Director Imax Corporation Deposition, January 15, 2008, Page 13.

According to the parties' Rule 19A Statements of Undisputed Facts, prior to the commencement of the solicitation on April 3, 2007, IMAX reached an agreement with Plainfield Special Solutions Master Fund Limited (Plainfield), beneficial owners of 33.6% of all outstanding Notes (or the equivalent to 67% of consents needed for a majority). Pursuant to the agreement, Plainfield would pledge its consents in favor of the waiver and proposed amendment to the Indenture. On April 10, 2007, the eighth day of the ten-day solicitation period, Plainfield, in contravention

³ Richard L. Gelfond is Co-Chairman, Co-Chief Executive Officer and Director of IMAX Corporation.

of its prior representations to IMAX, advised IMAX that there was a risk that it could not provide consents for roughly half of their Notes.⁴ Between April 10 - 12, 2007, IMAX contends that Plainfield attempted, unsuccessfully, to negotiate the reacquisition of the Notes with the needed voting rights. However, factual disputes remain as to when IMAX learned, with some definiteness, that Plainfield would be unable to obtain the votes it represented to IMAX it could.

Even assuming Catalyst's allegation as true, namely, that IMAX learned of the misrepresentation on April 10, 2007 and fraudulently continued disseminating the false information until April 12, 2007, Catalyst has not proven as a matter of law that it can satisfy the remaining elements of common law fraud.⁵ See *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 (1st Dept 2003) (dismissal appropriate where claimant lacks evidence of element of claim).

In particular, Catalyst's argument that it changed its position in reliance of IMAX's misstatement "by not countering the false information in the solicitation" falls short of meeting

⁴ Plainfield later disclosed to IMAX that certain Notes (along with voting rights) had been hypothecated pursuant to an broker agreement with Bear Stearns.

⁵ The elements of a claim for fraud are: (1) misrepresentation or a material omission of fact which was false and known to be false by the defendant; (2) that the misrepresentation was made for the purpose of inducing the other party to rely upon it; (3) justifiable reliance of the other party on the misrepresentation or material omission; and (4) injury. *Peach Parking Corp. v 346 W. 40th St., LLC*, 42 AD3d 82 (1st dept 2007).

the clear and convincing standard. See *Vermeer Owners, Inc. v Guterman*, 78 NY2d 1114 (1991) (each fraud element must be proven by clear and convincing evidence). Moreover, in opposing IMAX's motion for summary judgment, Catalyst has not demonstrated that it suffered an actionable loss from the alleged fraud. *Hanlon v MacFadden Publications, Inc.*, 302 NY 502, 510 (1951) ([a]ctual damage or injury to the [claimant] is an essential element of the action for deceit). Catalyst's assertion that note holders would have voted differently if IMAX had corrected the misstatement during the solicitation period or ran the solicitation again is far too speculative to be the basis for damage in its fraud claim. See, *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 (1996). Therefore, IMAX's motion is granted dismissing the fraud claim.

As to its cross-claim for breach of the Indenture, Catalyst argues that IMAX's April 13, 2007 press release correcting the misstatement (the "corrective disclosure") and extending the consent solicitation from April 13, 2007 to April 16, 2007 (one business day) to allow consenting note holders to withdraw their consent was inadequate to cure the prior misstatements. Further, Catalyst contends that IMAX's July 20, 2007 filing of its annual report with the SEC, which was authorized by the consent solicitation, was essentially a "sham" filing, contained known deficiencies, and acted purely as a "place holder".⁶ On these

⁶ On October 5, 2007, IMAX issued a press release announcing that the July 20 filing would be restated and should not be relied upon. IMAX eventually re-filed its financial statement

grounds, Catalyst seeks summary judgment on its cross-claim for breach of the Indenture.

Catalyst, as a movant for summary judgment on its own claims, bears the burden of proof on each of its cross-claims and must introduce evidence sufficient to demonstrate each element of those causes of action. See generally, *Allied Financial Corp. v Duo Factors, Inc.*, 26 AD2d 538, 538-9 (1st Dept 1966).

As to the adequacy of the corrective disclosure, Catalyst fails to make a prima facie showing that it was improper or unlawful. The solicitation memorandum⁷ that accompanied the consent solicitation granted IMAX sole discretion as to the length of the extension (April 13-16, 2007), and specified the method by which to disseminate such a correction (press release). Solicitation Memo, Page 2, 9. Catalyst sets forth no persuasive authority to prove that Imax's corrective disclosure was inadequate.

Similarly, in opposing IMAX's motion, Catalyst fails to evince that IMAX's SEC filing was invalid, in bad faith, or a nullity. Although the SEC sought clarification of certain issues in IMAX's filing, the filing was not rejected. There is no compelling evidence in the record that IMAX filed its report with

with the SEC on November 6, 2007. Catalyst has raised the argument that the July 20 filing was only used as a "place holder" to allow it time to file its annual report at a later date, preferably November 6, 2007.

⁷ Catalyst does not attack the reasonableness of the solicitation memorandum and therefore accepts the document as controlling.

knowledge of a deficiency, or any evidence that the contents of the filing was a "sham" or a "place holder." Furthermore, it should be noted that IMAX's filing, although late approximately twenty days pursuant to the terms of the Consent Solicitation, was timely because Catalyst served a notice of default on IMAX that gave it a thirty day period to cure the default. Therefore, the breach of contract and bad faith claims are dismissed.

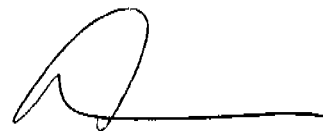
Furthermore, the record does not reflect, and Catalyst fails to demonstrate, that IMAX failed to cure a default under the Indenture. The consent solicitation was valid, effective, and not tainted by fraud. The corrective disclosure was in accordance with the solicitation memorandum, and the SEC filing was in accord with the terms of the Indenture, and made in good faith. All other arguments have been carefully considered, deemed without merit, and require no further discussion here. Accordingly, it is

ORDERED and ADJUDGED that no Event of Default occurred under the Indenture, and thus no acceleration of maturity has occurred; and it is further

ORDERED that Catalyst motion for summary judgment is denied; and it is further

ORDERED that IMAX's motion for summary judgment dismissing Catalyst's cross-complaint is granted.

Dated: April 21, 2009



J.S.C.
HON. CHARLES E. RAMOS