

All Points Capital Corp. v Ross Network, Inc.

2011 NY Slip Op 32591(U)

September 26, 2011

Supreme Court, Nassau County

Docket Number: 009390-2010

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
ALL POINTS CAPITAL CORPORATION,

Plaintiff,

-against-

**ROSS NETWORK, INC., PAUL ROSENBLIT,
THOMAS WHITE, JAY SCHARF and 291
DIGITAL NEW YORK, LLC,**

Defendants.
-----X

**TRIAL/IAS PART: 20
NASSAU COUNTY**

**Index No: 009390-2010
Motion Seq. No: 2
Submission Date: 8/30/11**

Papers Read on these Motions:

- Notice of Motion, Affidavit in Support, Affirmation in Support,
Affirmation of Services, Exhibits and Memorandum of Law.....X**
- Notice of Cross Motion, Affirmation in Opposition/Support and Exhibits...X**
- Notice of Cross Motion, Affidavit in Opposition/Support,
Statement of Controverted Facts and Exhibits.....X**
- Memorandum of Law in Opposition/Support.....X**
- Plaintiff's Reply Memorandum of Law, Exhibits and Affidavits.....X**
- Correspondence dated May 12, 2011.....X**

This matter is before the court on 1) the motion by Plaintiff All Points Capital Corporation ("All Points" or "Plaintiff"), filed March 31, 2011, 2) the cross motion by Defendants Jay Scharf ("Scharf") and Thomas White ("White"), filed April 29, 2011, and 3) the cross motion by Defendants Paul Rosenblit ("Rosenblit") and 291 Digital New York, LLC ("291 Digital") filed May 3, 2011, all of which were submitted on August 30, 2011, following oral argument. For the reasons set forth below, the Court denies Plaintiff's motion for summary judgment (motion sequence # 2), and directs that there will be a trial on the issue of whether the assignment of the loans at issue included the guarantees executed by the Defendants and,

therefore, whether Plaintiff has standing to pursue this action; and 2) reserves decision on the two cross motions (motion sequence #s 3 and 4), pending the trial directed by the Court herein.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 3212, granting Plaintiff summary judgment on the Verified Complaint.

Defendants Scharf and White cross move for an Order, pursuant to CPLR § 3025(b), granting Defendants them leave to amend their Answer to include an affirmative defense that Plaintiff's damages claims are unenforceable under New Jersey law, as a penalty.

Defendants Rosenblit and 291 Digital move for an Order, pursuant to CPLR § 3025(b), granting them leave to amend their second amended verified answer to add an affirmative defense that the late charges and default interest provided for in the instruments upon which Plaintiff sues are unenforceable as a penalty.

B. The Parties' History

The Complaint, which contains five (5) causes of action, alleges as follows:

First Cause of Action

Defendants Ross Network, Inc. ("Ross Network")¹ and 291 Digital are New York companies with offices for the transaction of business at 27 Johns Place, Freeport, New York 11520. Defendants Rosenblit, Scharf, and White are residents of Nassau County, New York.

On or about November 2, 2006, Ross Network entered into and executed an Installment Promissory Note ("Note 1") and a Security Agreement ("Agreement 1") (Exs. A and B to Complaint) with Lincoln Equipment Finance, a division of Lincoln Capital Group, Inc. ("Lincoln"), pursuant to which Ross Network financed the purchase of equipment and granted Lincoln a security interest in the equipment listed on Schedule A attached to Agreement 1 ("Collateral"). As further security for Ross Network's obligations under Agreement 1, and any other obligation of Ross Network, pursuant to Security Agreement 1, Ross Network granted a security interest in the Equipment to secure all obligations then existing or subsequently incurred.

¹ This action has been stayed against Defendant Ross Network due to its pending bankruptcy proceeding.

In connection with Agreement 1, on or about November 8, 2006, Lincoln filed a UCC financing statement (Ex. C to Complaint). On or about November 2, 2006, Rosenblit, White and Scharf executed guarantees ("Personal Guarantees") (Exs. D, E and F to Complaint), pursuant to which they guaranteed all obligations of Ross Network to Lincoln. On or about June 1, 2008, 291 Digital entered into and executed a Corporate Guaranty (Ex. M to Complaint) pursuant to which it guaranteed all obligations of Ross Network to Lincoln.

On or about June 27, 2007, pursuant to an Assignment of Chattel Paper and Security Agreement ("Assignment 1") (Ex. G to Complaint), Lincoln assigned to Plaintiff all of its rights and remedies under Note 1, Agreement 1 and the related documents. In connection with Assignment 1, on or about July 17, 2007, Plaintiff filed a UCC financing statement assignment (Ex. H to Complaint).

Defendants defaulted under paragraph 8 of Agreement 1 by failing to make the required monthly payments for May 15, 2009 and each month thereafter, despite demand by Plaintiff. Pursuant to paragraph 8 of Agreement 1, on default, Plaintiff may declare the entire accelerated balance to be immediately due and payable. In addition, pursuant to this paragraph, Defendants are liable to Plaintiff for attorney's fees and costs it has incurred in pursuing collection.

Plaintiff has declared Agreement 1 in default and demanded the accelerated balance, plus interest and late charges, for a total of TWENTY EIGHT THOUSAND EIGHT HUNDRED THIRTEEN DOLLARS AND 08/100 (\$28,813.08) as of April 22, 2010, plus accruing interest, costs, expenses and attorney's fees. Pursuant to paragraph 8 of Agreement 1, upon default, Plaintiff is also entitled to immediate and permanent title and possession of all of the Collateral that is the subject of Agreement 1, and Agreement 2 as outlined in the Second Cause of Action. Plaintiff has demanded possession of that Collateral and Defendants have refused that demand. Pursuant to their Individual and Corporate Guarantees, Defendants 291 Digital, Rosenblit, White and Scharf are liable to Plaintiff for the full balance due under Note 1 and Agreement 1.

Plaintiff seeks judgment against Defendants Ross Network, Rosenblit, White, Scharf and 291 Digital, jointly and severally, for 1) the amount of \$28,813.08, as of April 22, 2010, plus accruing interest, 2) immediate and permanent title and possession of the Collateral, and 3) court costs, expenses and attorney's fees.

Second Cause of Action

Plaintiff repeats and realleges the allegations set forth in support of the First Cause of Action.

On or about June 2, 2008, Ross Network entered into and executed an Installment Promissory Note ("Note 2") and Security Agreement ("Agreement 2") with Lincoln (Exs. I and J to Compl) pursuant to which Ross Network financed the purchase of equipment and granted Lincoln a security interest in the Collateral. As further security of Ross Network's obligations under Agreement s, pursuant to the terms of Agreement 2, Ross Network granted a security interest in the Collateral to secure its obligations.

As further security for Ross Network's obligations under Agreement 2, on or about June 2, 2008, Ross Network entered into and executed a Rider to Security Agreement and Installment Promissory Note ("Rider") between Ross Network and Lincoln (Ex. K to Complaint).

In connection with Agreement 2, on or about June 3, 2008, Lincoln filed a UCC financing statement (Ex. L to Compl.). On or about June 2, 2008, Rosenblit, White and Schard entered into Individual Guarantee Agreements (Exs. N, O and P to Compl.) pursuant to which they guaranteed all obligations of Ross Network to Lincoln. On or about August 15, 2008, pursuant to an Assignment of Chattel Paper and Security Agreement ("Assignment 2") (Ex. Q to Compl.), Lincoln assigned to Plaintiff all of its rights and remedies under Note 2, Agreement 2 and related documents. On or about October 1, 2008, in connection with Assignment 2, Plaintiff filed a UCC financing statement assignment (Ex. R to Compl.).

Defendants defaulted under Agreement 2 by failing to make required monthly payments for June 15, 2009 and subsequent months, despite demand by Plaintiff. Pursuant to paragraph 8 of Agreement 2, upon default, Plaintiff may declare the entire accelerated balance immediately due and payable. In addition, pursuant to paragraph 8 of Agreement 2, upon default, Defendants are liable for attorney's fees and costs incurred by Plaintiff in collection.

Plaintiff has declared Agreement 2 in default and demanded the accelerated balance, plus interest and late charges, for a total of ONE MILLION ONE HUNDRED SEVENTY-NINE THOUSAND ONE HUNDRED TWENTY-NINE DOLLARS AND 89/100 (\$1,179,129.89) as

of April 22, 2010, plus accruing interest, costs, expenses and attorney's fees.

In addition, pursuant to paragraph 8 of Agreement 2, upon default, Plaintiff is entitled to immediate and permanent title and possession of the Collateral. Plaintiff has demanded possession of that Collateral and Defendants have refused that request. Pursuant to the Individual and Corporate Guarantees, 291 Digital, Rosenblit, White and Scharf are liable to Plaintiff for the full balance due under Note 2 and Agreement 2.

Plaintiff seeks judgment against Defendants Ross Network, Rosenblit, White, Scharf and 291 Digital, jointly and severally, for 1) the amount of \$1,179,129.89, as of April 22, 2010, plus accruing interest, 2) immediate and permanent title and possession of the Collateral, and 3) court costs, expenses and attorney's fees.

Third Cause of Action

Plaintiff repeats and realleges the allegations in support of the First and Second Causes of Action. Plaintiff submits that those allegations establish that Defendants intentionally and knowingly converted Plaintiff's assets and property, causing injury to Plaintiff.

Plaintiff seeks judgment against Defendants Ross Network, Rosenblit, White, Scharf and 291 Digital, jointly and severally, for 1) the amount of \$1,207,942.97, as of April 22, 2010, plus accruing interest, 2) immediate and permanent title of the Collateral, 3) court costs, expenses and attorney's fees, and 4) punitive damages.

Fourth Cause of Action

Plaintiff repeats and realleges the allegations in support of the First, Second and Third Causes of Action.

Plaintiff alleges that, in entering the transactions at issue, Plaintiff relied on the representations of the Defendants in the Agreements, Guarantees and other relevant documents. Plaintiff has been injured as a result of Defendants' failure to comply with its obligations in the relevant instruments. Plaintiff submits that, in light of the foregoing, Defendants are estopped from disputing the terms of the Agreements, Guarantees and related documents.

Plaintiff seeks judgment against Defendants Ross Network, Rosenblit, White, Scharf and 291 Digital, jointly and severally, for 1) the amount of \$1,207,942.97, as of April 22, 2010, plus accruing interest, 2) immediate and permanent title of the Collateral, and 3) court costs, expenses

and attorney's fees.

Fifth Cause of Action

Plaintiff repeats and realleges the allegations in support of the First, Second, Third and Fourth Causes of Action.

Plaintiff alleges that, as a result of Defendants' conduct as outlined, Defendants have been unjustly enriched.

Plaintiff seeks judgment against Defendants Ross Network, Rosenblit, White, Scharf and 291 Digital, jointly and severally, for 1) in the amount of \$1,207,942.97, as of April 22, 2010, plus accruing interest, 2) the Collateral, and 3) court costs, expenses and attorney's fees.

The Assignments provide, in pertinent part, as follows:

Assignment 1

Lincoln Equipment Finance, a division of, Lincoln Capital Group, Inc. (the "Company") for value received including but not limited to the purchase price of \$404,446.37 hereby sells, assigns and transfers to [All Points], without recourse to the Company except as otherwise provided herein, all of the Company's right, title and interest in and to the following (herein collectively referred to as the "Chattel Paper"): Note & Security Agreement dated November 2, 2006 between the Company and [Ross Network] #2162 (the "Debtor"), together with all of the monies due or to become due hereunder, and all of the agreements, guaranties (with or without security), documents and instruments related thereto and described as follows: -----

Assignment 2

Lincoln Equipment Finance, a division of, Lincoln Capital Group, Inc. (the "Company") for value received including but not limited to the purchase price of \$1,258,066.46 hereby sells, assigns and transfers to [All Points], without recourse to the Company except as otherwise provided herein, all of the Company's right, title and interest in and to the following (herein collectively referred to as the "Chattel Paper"): Note & Security Agreement dated June 2, 2008 between the Company and [Ross Network] #2212 (the "Debtor"), together with all of the monies due or to become due hereunder, and all of the agreements, guaranties (with or without security), documents and instruments related thereto and described as follows: -----

In her Affidavit in Support of Plaintiff's motion, Catherine Wilinsky ("Wilinsky"), a Senior Vice President of Plaintiff, affirms that the Guaranties were included in the Assignments. She affirms, further, that Plaintiff maintains possession and control of the original Notes, Security Agreements and Guaranty Agreements, and has maintained possession and control of those instruments since purchasing Lincoln's rights in the Guaranty Agreements.

In his Affidavit in Support of Plaintiff's motion, James Miller ("Miller"), a President of Lincoln Equipment Finance, a division of Lincoln Capital Group, Inc. ("Lincoln"), affirms that he personally executed the Assignments as President of Lincoln and submits that the Assignments included the Guaranty Agreements. Miller avers that it was Lincoln's intention to include the Guaranty Agreements in the Assignments.

The Individual Defendants executed a Settlement Agreement in the related Bankruptcy Action (Ex. 18 to Rosenblit Aff. in Opp./Supp.), discussed in a prior decision of the Court dated June 29, 2011. The Settlement Agreement includes language stating that "Nothing contained herein shall be deemed an admission of any facts or circumstances" (Settlement Agreement at p. 4).

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to summary judgment by producing the applicable commercial instruments and demonstrating Defendants' default thereunder. Plaintiff also argues that the Guarantors are foreclosed, by virtue of the Settlement Agreement, from contesting the validity of the Assignments.

Moving Defendants oppose Plaintiff's motion, submitting that the Assignment did not include an assignment of the Guarantees. Defendants note that the Assignments do not mention the Guarantees after the words "described as follows," and argue that the use of hyphens, rather than underlines, suggests that reference to the Guarantees was intentionally omitted.

RULING OF THE COURT

A. Summary Judgment Standards

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in

admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. Relevant Contract Principles

Agreements are to be construed in accordance with the parties' intent. When parties set down their agreement in a clear complete document, their writing should be enforced according to its terms. *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004), quoting *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990). Where the parties' intent is discernible from the plain meaning of the language of the contract, there is no need to look further. *Evan v. Famous Music Corp.*, 1 N.Y.3d 452, 458 (2004).

Where a contract is straightforward and unambiguous, its interpretation presents a question of law for the court to be made without resort to extrinsic evidence. *Ruttenberg v. Davidge Date Sys. Corp.*, 215 A.D.2d 191, 193 (1st Dept. 1995). When, however, the meaning of a contract is ambiguous and the intent of the parties becomes a matter of inquiry, a question of fact is presented that cannot be resolved on motion papers alone. *Id.*, quoting *Eden Music Corp. v. Times Sq. Music Publs.*, 127 A.D.2d 161, 194 (1st Dept. 1987). Where interpretation of a contract is susceptible to varying reasonable interpretations, and intent must be gleaned from disputed evidence or from inferences outside the written words, resolution by the fact finder is required. *Time Warner Entertainment Co., L.P. v Brustowsky*, 221 A.D.2d 268 (1st Dept. 1995), *app. den.*, 89 N.Y.2d 809 (1997).

C. Application of these Principles to the Instant Action

Preliminarily, the Court concludes that Defendants are not precluded from contesting the Assignments by virtue of their execution of the Settlement Agreement. The language of the Settlement Agreement, including the provision quoted *supra*, does not support Plaintiff's argument in this regard.

The Court concludes that the language of the Assignments is ambiguous on the issue of whether they included the Guarantees, particularly in light of the following language in the

Assignments:

...together with all of the monies due or to become due hereunder, and all of the agreements, guaranties (with or without security), documents and instruments related thereto and described as follows: -----

In light of the ambiguity presented by the language of the Assignments, and the conflicting affidavits regarding whether the Assignments included the Guarantees, a trial on that issue is required.

The Court reserves decision on Defendants' cross motions. If the trial directed herein results in a determination by the Court that the Assignments did not include the Guarantees, and therefore that Plaintiff lacks standing to pursue this action, Defendants' cross motions will be rendered moot. If the Court concludes that the Assignments did include the Guarantees, then the Court will decide Defendants' cross motions. Defendants' cross motions (motion sequence #s 3 and 4) will appear on the Court's calendar on November 14, 2011.

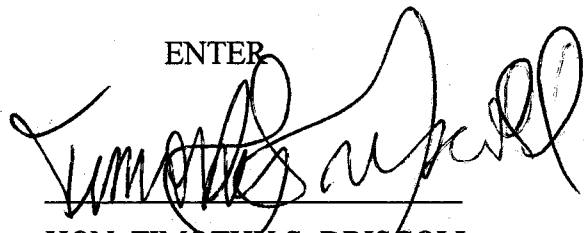
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a conference on November 14, 2011 at 11:00 a.m., at which time the Court will schedule the trial as directed herein. Motion sequence #s 3 and 4 will also appear on the Court's calendar that day.

DATED: Mineola, NY
September 26, 2011

ENTER



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
OCT 03 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE