

Arrowhead Target Fund, Ltd. v Hoffman

2011 NY Slip Op 33795(U)

August 8, 2011

Supreme Court, New York County

Docket Number: 651481/10

Judge: Jeffrey K. Oing

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

Index Number : 651481/2010

PART 48

ARROWHEAD TARGET FUND, LTD.

vs.

HOFFMAN, PETER

SEQUENCE NUMBER : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were filed on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

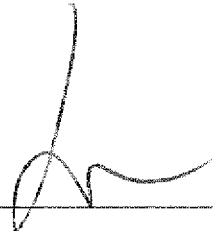
Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the annexed decision and order of the Court.

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

RECEIVED
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MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: 8/8/11



JEFFREY K. OING J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

-----x

ARROWHEAD TARGET FUND, LTD.,

Plaintiff,

-against-

PETER HOFFMAN, SUSAN HOFFMAN,
SEVEN ARTS PICTURES, INC.,
SEVEN ARTS PICTURES, PLC. D/B/A
SEVEN ARTS INTERNATIONAL,
SEVEN ARTS ENTERTAINMENT, INC.,
SEVEN ARTS FUTURE FLOWS, I, LLC,
SEVEN ARTS FILMED ENTERTAINMENT LIMITED,
CINEVISIONS D/B/A
SEVEN ARTS PICTURES and
SEVEN ARTS PICTURES LIMITED,

Defendants.

-----x

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DECISION AND ORDER

JEFFREY K. OING, J.:

Defendants, Peter Hoffman, Susan Hoffman, Seven Arts Pictures, Inc., Seven Arts Pictures, PLC. d/b/a Seven Arts International, Seven Arts Entertainment, Inc., Seven Arts Filmed Entertainment Limited, CineVisions d/b/a Seven Arts Pictures, and Seven Arts Pictures Limited (collectively "moving defendants"), move, pursuant to CPLR 3211(a) [1] and [8], for an order dismissing the complaint against them.

Defendant Seven Arts Future Flows I, LLC, ("answering defendant") does not join in this motion.

Plaintiff, Arrowhead Target Fund, Ltd., cross-moves, pursuant to CPLR 3211(d), for an order holding the moving defendants' motion to dismiss in abeyance pending jurisdictional

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discovery and granting it leave to conduct jurisdictional discovery.

Background

Plaintiff commenced this action to enforce its rights under the following agreements: 1) secured term loan promissory note; 2) note purchase and security agreement; 3) collateral agent agreement; 4) three purchase agreements ("purchase agreements") between plaintiff and Comerica Bank, Palm Finance Corporation, and Natexis Banques Populaires (collectively the "banks"); and 5) sale and servicing agreement (collectively the "agreements").

The agreements were between and among plaintiff, defendants, and third parties. Pursuant to the agreements, plaintiff made a loan to the moving defendants of \$8.3 million, collateralized by the rights in thirteen feature length theatrical motion pictures (the "films"), including the copyrights and the proceeds in the exploitation of the films throughout the world. Prior to this transaction, moving defendants had consolidated and reorganized the debts incurred in the production, distribution, or acquisition of the films and were indebted to the banks.

Moving defendants organized a new subsidiary, namely, answering defendant, Seven Arts Future Flows I, LLC, to which, plaintiff contends, the moving defendants sold all of their rights, title, and interest in the films, contracts relating to the films, and the results and proceeds of the worldwide

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distribution of the films (the "collateral"). In turn, for its part, plaintiff acquired a security interest in all of the assets conveyed to the answering defendant, as well as the rights of the banks under their loan agreements with the moving defendants.

Plaintiff claims that defendant Seven Arts Filmed Entertainment Limited, a wholly owned subsidiary of defendant Seven Arts Pictures, acted as "servicer", that is, an agent providing services in connection with the continued exploitation of the films, including soliciting sales and assuring that all proceeds generated by the exploitation of the films were remitted to a collateral account at Bank of New York (the "collateral account") for plaintiff's benefit. Plaintiff argues that the moving defendants projected that the funds generated from existing contracts, and the sale of unsold rights to exploit the films throughout the world would be sufficient to pay the principal and interest accrued on plaintiff's loan. The principal amount of \$8.3 million was required to be repaid in full by February 15, 2009.

Pursuant to the transaction, plaintiff also purchased the pre-existing debts to the banks. As such, the pre-existing loan agreements and other documents executed by moving defendants for the bank loans were assigned to plaintiff, together with the collateral securing these debts (Moving Papers, Ex. A, Complaint, Exs. 4, 5, 6, 7). Plaintiff claims that among the assigned loan

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documents was the continuing guaranty of defendant Peter Hoffman (Moving Papers, Ex. A, Complaint, Ex. 9). Plaintiff also claims defendant Hoffman further agreed on behalf of moving defendants that defendant Seven Arts Pictures, Inc. and defendant Seven Arts Filmed Entertainment Limited would perform all of the obligations under the original loan agreements on behalf of plaintiff (Cross-motion, Ex. 1).

Regarding personal jurisdiction, plaintiff asserts the following in the complaint:

The agreements between and among the defendants provide that they and all other agreements including ... all writings executed at any time by any of the parties or their affiliates, shall be governed and controlled by the internal laws of the State of New York and stipulate that all suits arising out of or related to the various agreements or the collateral may be brought within the courts located in the City of New York.

(Moving Papers, Ex. A, ¶ 12).

Moving defendants argue that all claims against them should be dismissed pursuant to CPLR 3211(a)[1] and [8] since the documentary evidence shows that none of the moving defendants are subject to personal jurisdiction in the State of New York. Moving defendants further claim that plaintiff's sole basis for jurisdiction against them is their consent to jurisdiction in New York, contained in the agreements.

Regarding the various agreements, moving defendants make the following arguments:

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- 1) As to the secured term loan promissory note, moving defendants argue that none of them are parties to the promissory note which was executed by the answering defendant, Seven Arts Future Flows I, LLC.
- 2) The note purchase and security agreement was signed by plaintiff, as "lender", and the answering defendant, Seven Arts Future Flows I, LLC, as "borrower", and moving defendants Seven Arts Filmed Entertainment Limited and Seven Arts Pictures Inc., collectively as "seller" and "guarantor" (Moving Papers, Ex. A, Complaint, Ex. 2). Moving defendants do not dispute that Seven Arts Filmed Entertainment Limited and Seven Arts Pictures Inc. were signatories to the note purchase and security agreement, but argue that they did not agree to the forum selection clause in paragraph 20 choosing New York courts for disputes under this agreement. In that regard, Seven Arts Filmed Entertainment Limited and Seven Arts Pictures Inc. were specifically not defined as "borrowers". The note purchase and security agreement clearly delineated between the "borrower" and the other signatories, who were non-borrowers. Further, the non-borrowers were specifically excluded in paragraph 20 containing the forum selection clause, and never agreed to the provisions of paragraph 20. Lastly, the other moving defendants are not parties to the note purchase and security agreement.
- 3) The collateral agent agreement, between the answering defendant Seven Arts Future Flows I, LLC as "owner", moving defendant Seven Arts Filmed Entertainment Limited as "servicer", plaintiff as "lender", and The Bank of New York Trust Company, N.A., as the "collateral agent", established the collateral account to receive the proceeds in the exploitation of the films (Moving Papers, Ex. A, Complaint, Ex. 3). Moving defendants argue that moving defendant Seven Arts Filmed Entertainment Limited accepted New York jurisdiction pursuant to the collateral agreement, but only with respect to the items set forth in the collateral agreement. Moving defendants contend that none of the items set forth in the collateral agreement are at issue in this litigation. Lastly, none of the other moving defendants are parties to the collateral agreement.
- 4) The purchase agreements are between plaintiff and the banks (Moving Papers, Ex. A, Complaint, Exs. 4, 5, 6). Defendants argue that none of the moving defendants are parties to these purchase agreements and that each purchase agreement

relates to the assignment to plaintiff of the rights of the prior lenders under certain prior loan documents described in each purchase agreement. Each of these loan documents has a forum clause designating California courts and jurisdiction. The purchase agreement between Comerica Bank and plaintiff included a continuing guaranty by moving defendant Peter Hoffman, dated October 8, 2003, ("Hoffman guaranty") which specifically selects, in paragraphs 5.7 and 5.8, California law and California jurisdiction for disputes arising under the Hoffman guaranty (Moving Papers, Ex A, Complaint, Ex. 9).

- 5) The sale and servicing agreement is between the answering defendant, Seven Arts Future Flows I, LLC, as the "buyer" and moving defendants Seven Arts Pictures PLC, Seven Arts Filmed Entertainment Limited, and Seven Arts Pictures Inc., collectively, the "seller" (Moving Papers, Ex. A, Complaint, Ex. 8). Moving defendants point out that plaintiff is not a party this agreement. Further, the sale and servicing agreement does not contain a forum selection clause.

Forum Selection Clause

Plaintiff argues that the moving defendants waived any right to contest plaintiff's selection of New York as the forum for the enforcement of its rights arising under any of the agreements related to the transaction. In that regard, plaintiff refers to paragraph 20 in the Note Purchase and Security Agreement, entitled "Choice Of Governing Law; Construction; Forum Selection". Paragraph 20 provides in relevant part as follows:

THIS AGREEMENT AND THE OTHER AGREEMENTS SHALL BE GOVERNED AND CONTROLLED BY THE INTERNAL LAWS OF THE STATE OF NEW YORK AS TO INTERPRETATION, ENFORCEMENT, VALIDITY, CONSTRUCTION, EFFECT, AND IN ALL OTHER RESPECTS ...

To induce Lender to accept this Agreement, Borrower irrevocably agrees that, subject to Lender's sole and absolute election, ALL ACTIONS OR PROCEEDINGS IN ANY WAY, MANNER OR RESPECT, ARISING OUT OF OR FROM

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OR RELATED TO THIS AGREEMENT, THE OTHER AGREEMENTS OR THE COLLATERAL SHALL BE LITIGATED IN COURTS HAVING SITES WITHIN THE CITY OF NEW YORK, STATE OF NEW YORK. BORROWER HEREBY CONSENTS AND SUBMITS TO THE JURISDICTION OF ANY LOCAL, STATE OR FEDERAL COURTS LOCATED WITHIN SAID CITY AND STATE. EACH LOAN PARTY HEREBY WAIVES ANY RIGHT IT MAY HAVE TO TRANSFER OR CHANGE THE VENUE OF ANY LITIGATION BROUGHT AGAINST SUCH LOAN PARTY BY LENDER IN ACCORDANCE WITH THE PRECEDING SENTENCE.

(Moving Papers, Ex. A, Complaint, Ex. 2). "Other Agreements" is defined as follows:

[A]ll agreements, instruments and documents, other than this Agreement, including, without limitation, guaranties, mortgages, trust deeds, pledges, powers of attorney, consents, assignments, contracts, notices, security agreements, leases, financing statements, the Note, the Acquisition Documents and the Sale and Servicing Agreement, the Collateral Agent Agreement and UCC-1 Financing Statements and Copyright Mortgage and Assignment and all other writings heretofore, now or from time to time hereafter executed by or on behalf of Borrower, Guarantors or their Affiliates or any other Person and delivered to Lender or to any parent, Affiliate or subsidiary of Lender in connection with the Liabilities, the Acquired Assets or the transactions contemplated hereby or thereby, as each of the same may be amended, modified or supplemented from time to time.

(Moving Papers, Ex. A, Complaint, Ex. 2, p. 4).

Plaintiff argues the choice of law and forum selection clause were not limited to any one document and expressly applied to the "other agreements," a defined term which includes any document signed by any person, including the individual defendants, and their companies, past or present, which were a part of the transaction (Moving Papers, Ex. A, Complaint, Ex. 2,

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p. 4). In this way, according to plaintiff, paragraph 20 effected a global amendment of all "writings heretofore, now or thereafter" related to the collateral, the loans, and the transaction. Further, each of the moving defendants is either a borrower, guarantor, or their affiliates, or a person who executed a document, which was delivered to plaintiff in connection with the transaction.

Plaintiff also claims that each of the moving defendants, including defendants Peter and Susan Hoffman, executed one or more of the "other documents", or the note purchase and security agreement itself, thus, each is a "loan party" within the meaning of paragraph 20 and expressly consented to all the terms of the transaction. It maintains that defendants Peter and Susan Hoffman were not only parties to the assignment of one of the bank loans, but also, as the sole owners and directors of Seven Arts Pictures, Inc., and through it, Seven Arts Future Flows, I, LLC, but that they expressly consented to all of the terms of the Note Purchase and Security Agreement.

Moving defendants, on the other hand, argue that paragraph 20 of the note purchase and security agreement limits consent to jurisdiction to the "borrower" -- answering defendant, Seven Arts Future Flows, I, LLC. Further, the two moving defendants who were signatories to the note purchase and security agreement were so for such limited purposes.

Discussion

A fundamental precept of contract interpretation is that agreements are construed in accord with the intent of the parties and the best evidence of the parties' intent is what they express in their written agreement (Innophos, Inc. v Rhodia, S.A., 10 NY3d 25 [2008]).

The first relevant section of paragraph 20 provides as follows:

THIS AGREEMENT AND THE OTHER AGREEMENTS SHALL BE GOVERNED AND CONTROLLED BY THE INTERNAL LAWS OF THE STATE OF NEW YORK AS TO INTERPRETATION, ENFORCEMENT, VALIDITY, CONSTRUCTION, EFFECT, AND IN ALL OTHER RESPECTS

This sentence is a choice of law provision and not a forum selection clause. As such, it, standing alone, does not form the basis for New York jurisdiction.

The section providing that "EACH LOAN PARTY HEREBY WAIVES ANY RIGHT IT MAY HAVE TO TRANSFER OR CHANGE THE VENUE OF ANY LITIGATION BROUGHT AGAINST SUCH LOAN PARTY BY LENDER IN ACCORDANCE WITH THE PRECEDING SENTENCE", is also not a forum selection clause. Rather, it is merely a waiver of a loan party's right to seek a change of venue.

Regarding the venue clause, plaintiff argues that "loan party" is a broad term that applies to parties to the "other agreements". In addition, plaintiff refers to CV Holdings, LLC v Bernard Technologies, Inc., 14 AD3d 854 [3rd Dept 2005] for its

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argument that use of the word "venue" in that clause applies to jurisdiction. Plaintiff's reliance is misplaced. In CV Holdings, there was no separate and distinct forum selection clause. Instead, the clause at issue in that case was entitled "Venue" and the Appellate Division, Third Department, found that the venue clause encompassed personal jurisdiction over defendant. The Appellate Court reasoned that "to interpret the provision as defendant urges would render it meaningless inasmuch as a court that lacks jurisdiction cannot, at the same time, be the proper venue for an action" (Id.). Further, because defendant waived "any objection that such forum is inconvenient or improper" that waiver presumably included objections to the court's jurisdiction (Id.).

In this case, unlike CV Holdings, paragraph 20 provides three separate, mutually exclusive, clauses dealing with forum selection and consent to jurisdiction, as well as venue. Further, the venue clause in this action does not refer to a specific entity, but rather refers to a "loan party" which is not a defined term.

The section of paragraph 20 that does contain a forum selection clause provides as follows:

To induce Lender to accept this Agreement, Borrower irrevocably agrees that, subject to Lender's sole and absolute election, ALL ACTIONS OR PROCEEDINGS IN ANY WAY, MANNER OR RESPECT, ARISING OUT OF OR FROM OR RELATED TO THIS AGREEMENT, THE OTHER AGREEMENTS OR THE

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COLLATERAL SHALL BE LITIGATED IN COURTS HAVING SITES
WITHIN THE CITY OF NEW YORK, STATE OF NEW YORK.

Contrary to plaintiff's argument, this forum selection clause cannot be read to apply to the moving defendants. The clause is specific in that it binds only plaintiff as "lender" and Seven Arts Future Flows I, LLC as "borrower" as defined in the note purchase and security agreement, unlike the previous venue section which refers to "loan party", an undefined term. With the exception of defendants Seven Arts Filmed Entertainment Limited and Seven Arts Pictures Inc., the remaining moving defendants were non-signatories to the note purchase and security agreement. As for defendants Seven Arts Filmed Entertainment Limited and Seven Arts Pictures, Inc., they are not defined as "borrowers" in the note purchase and security agreement. Indeed, the forum selection clause of paragraph 20 is specific in that it identifies only the "borrower" as agreeing to be bound by the forum selection clause. Further, simply because the forum selection clause refers to the "other agreements" does not change the fact that only the "borrower" agreed to be bound by the clause.

Moreover, the consent to jurisdiction clause - "BORROWER HEREBY CONSENTS AND SUBMITS TO THE JURISDICTION OF ANY LOCAL, STATE OR FEDERAL COURTS LOCATED WITHIN SAID CITY AND STATE" - lends further support that the parties' intention was that only

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the borrower was consenting to New York jurisdiction and would be bound by the forum selection clause.

Plaintiff's argument that the other agreements are integrated into the note purchase and security agreement is also unpersuasive and the cases plaintiff cites in support of this argument are, again, distinguishable. For example, North American Airlines, Inc. v Wilmington Trust Company, __ Misc 3d __, 2010 NY Slip Op 31260U [Sup Ct, New York County 2010], involved a situation where the non-signatory to the agreement containing the forum selection clause was also the party seeking to enforce the forum selection clause. Here, plaintiff, a signatory of the note purchase and security agreement, is attempting to bind, and assert personal jurisdiction over, non-signatories to the agreement. In addition, the case Albany Insurance Co. v Banco Mexicano, S.A., __ F Supp __, 1998 US Dist LEXIS 16292 [SDNY 1998], is also distinguishable. In that case, the forum selection clause at issue included language that "the interested parties" agree, unlike the case at bar where it is "the borrower" agrees.

Based on the foregoing, moving defendants' motion to dismiss the complaint against them is granted as against all moving defendants except Seven Arts Filmed Entertainment Limited. Seven Arts Filmed Entertainment Limited is subject to New York jurisdiction by virtue of it being a signatory to the collateral

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agent agreement. Paragraph 4.2 of the collateral agent agreement provides that "[e]ach of the parties hereto submits to the non-exclusive personal jurisdiction of the state and federal courts sitting in the Borough of Manhattan, New York, New York as an appropriate place for adjudicating any dispute hereunder" (Moving Papers, Ex. A, Complaint, Ex. 3). Seven Arts Filmed Entertainment Limited is clearly a "party" to the collateral agent agreement as its "servicer". And, contrary to moving defendants' argument, the record does not clearly demonstrate that plaintiff's claims strictly involve the note purchase and security agreement to the exclusion of the collateral agent agreement.

Plaintiff's cross-motion for leave to conduct jurisdictional discovery is denied. Nothing in the record provides a basis for such discovery.

Accordingly, it is

ORDERED that defendants' motion is granted to the extent of dismissing the complaint against Peter Hoffman, Susan Hoffman, Seven Arts Pictures, Inc., Seven Arts Pictures, PLC. d/b/a Seven Arts International, Seven Arts Entertainment, Inc., CineVisions d/b/a Seven Arts Pictures, and Seven Arts Pictures Limited, and is denied as to Seven Arts Filmed Entertainment Limited; and it is further

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ORDERED that plaintiff's cross-motion for leave to conduct jurisdictional discovery is denied; and it is further

ORDERED that counsel are directed to contact Part 48 at 646-386-3265 to schedule a status conference.

This memorandum opinion constitutes the decision and order of the Court.

Dated:

8/8/11


HON. JEFFREY K. OING, J.S.C.