

Spencer Trask Specialty Group LLC v Intralytix Inc.
2011 NY Slip Op 33890(U)
September 27, 2011
Supreme Court, New York County
Docket Number: 601333/08
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

SPENCER TRASK SPECIALTY GROUP LLC

INDEX NO. 601333/08

- v -

INTRALYTIX INC.

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read 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 *to dismiss the complaint brought by defendant is GRANTED per the attached Decision and Order.*

The Clerk shall enter judgment accordingly.

Dated: September 27, 2011

Melvin L. Schweitzer
MELVIN L. SCHWEITZER, S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

Intralytix does not assert that the Convertible Note has been paid or that it is not yet due and payable by its terms. Rather, Intralytix points to the terms of the Subordination Agreement among Spencer Trask and two corporations, one of which, Ecolab, made a \$1 million senior loan (“Senior Loan”) to Intralytix. The Senior Loan subsequently was assigned to another corporation, MeyerFlyer LLC (“MeyerFlyer”) in December 2008. Spencer Trask does not challenge the validity of the assignment.

Intralytix asserts that Spencer Trask may neither bring this suit nor be paid on the Convertible Note as the terms of the Subordination Agreement prohibit such actions. The Senior Loan remains unpaid. In January 2011, MeyerFlyer sent Spencer Trask notice of Intralytix’s default on the Senior Loan in the form of a Suspension Notice (“Suspension Notice”). The Suspension Notice communicated that there still existed a \$225,000 balance on the Senior Loan and that pursuant to the terms of the Subordination Agreement, Spencer Trask could not bring any action to collect on the Convertible Note until the Senior Loan is paid in full and satisfied. Accordingly, Intralytix moves to dismiss the complaint pursuant to CPLR 3211.

Discussion

Pursuant to CPLR 3211 (a) (1), a party may move to dismiss a cause of action on the ground that its defense is founded upon documentary evidence. In ruling on a motion to dismiss, the court must accept the allegations of the Complaint as true and take all facts in the light most favorable to the non-moving party. *Cron v Hargro Fabrics*, 91 NY2d 362, 366 (1998). However, the court is not bound by the allegations of the Complaint where they are clearly contradicted by documentary evidence. *Skillgames LTC v Brody*, 1 AD3d 247, 250 (1st Dept 2003). Dismissal is warranted under CPLR 3211 (a) (1) if the documentary evidence

conclusively establishes a defense to the claims asserted in the complaint as a matter of law.

Foster v Kovner, 44 AD3d 23, 28 (1st Dept 2007). Additionally, documentary evidence

demonstrating the terms governing the contractual relationship between the parties may

conclusively establish a defense to the plaintiff's breach of contract claim as a matter of law.

Sargent v New York Daily News, 42 AD3d 491, 493 (2d Dept 2007); *see also Taussig v Clipper*

Group, 13 AD3d 166, 167 (1st Dept 2004) ("provisions of a contract addressing the rights of

parties will prevail over allegations in a complaint").

It is clear from the terms of the Convertible Note that Spencer Trask's loan is junior and subordinate to Intralytix's indebtedness to MeyerFlyer. The terms of the Convertible Note state that "[t]he payment of the indebtedness evidenced by this Note is subordinated to the payment of the 'Ecolab Finance Debt' as such term is defined and described in that certain Subordination Agreement dated as of April 30, 2003 . . ." The Subordination Agreement provides that Spencer Trask will not commence any action or proceeding against Intralytix exercising any rights or remedies Spencer Trask may have under the Convertible Note until the Senior Loan has been fully and finally paid in cash. Spencer Trask also agreed in the Subordination Agreement that Ecolab may renew, extend, or modify the Senior Loan in any manner without notice to, or consent of, Spencer Trask. Accordingly, the action here is barred by the Subordination Agreement that Spencer Trask freely entered into.

Spencer Trask does not dispute the enforceability or effect of the Subordination Agreement, but rather made a decision to pay off the balance of the Senior Loan and claim that the terms of the Subordination Agreement have been satisfied, thus ostensibly allowing it to bring this action. Spencer Trask asserts that it decided to satisfy Intralytix's obligations to

MeyerFlyer and communicated its intention to Robert Jaffe, Esq. of Kutak Rock LLC, the attorneys for MeyerFlyer, in an email dated March 30. In response, Mr. Jaffe informed Spencer Trask's counsel that he was not authorized to provide a pay-off figure or his firm's wire transfer information. Subsequently, Spencer Trask made out a check payable to the order of MeyerFlyer in the amount of \$274,722.33, and delivered it by Fed-Ex to Mr. Jaffe. Spencer Trask contends this constitutes payment in full of Intralytix's debt to MeyerFlyer, including the principal and accrued interest on the Senior Loan through June 6, 2011. However, Spencer Trask's attempted payment was not accepted by MeyerFlyer or its attorney.

Spencer Trask argues that MeyerFlyer's refusal to accept the payment constitutes a breach of the duty of good faith and fair dealing that a senior lender has to a junior lender under a subordinated debt agreement. Spencer Trask cites an out-of-state case, *Ranier v Mount Sterling National Bank*, 812 SW2d 154 (Ky 1991) to argue that a creditor has a duty to apply payments it receives in a manner which does not prejudice a third party creditor under a subordinated security interest. Besides the fact that Kentucky law is not binding upon a New York court, the court would distinguish *Ranier* from the facts here. In *Ranier*, the holder of the subordinated debt brought suit against the senior lender for applying payments from the debtor to a secondary loan made to the debtor instead of the primary loan, which prejudiced the priority of the plaintiff's subordinated interest. 812 SW2d at 156-57. Here, in contrast, plaintiff is suing the borrower, not the senior lender. Additionally, plaintiff here does not claim that the debtor's payments have been misapplied but rather that MeyerFlyer, as the senior lender, has refused to accept payment from Spencer Trask on the behalf of Intralytix.

Under New York law, MeyerFlyer is not obligated to accept payment from Spencer Trask in satisfaction of Intralytix's obligations. First, a valid tender of the amount owed to the creditor must be made by the debtor or by an agent or other person authorized to make it on behalf of the debtor. *Blomgren v Tinton 763 Corp*, 33 Misc 2d 1057, 1058 (NY Sup 1962). Spencer Trask is not an agent or authorized representative of Intralytix. Furthermore, Spencer Trask is not a party to the Senior Loan Agreement between Intralytix and MeyerFlyer. MeyerFlyer is not obligated to accept payment from a party that is a mere stranger to the loan. *See id* at 1058-59. Second, delivery of a check does not constitute full and final payment of a debt where the check is not cashed. *Carmichael v. General Elec Co*, 102 AD2d 838, 839 (2d Dept 1984). MeyerFlyer did not cash or accept the check and therefore the Senior Loan cannot be considered to be paid in full and satisfied. As the defendant has pointed out, any claims relating to Spencer Trask's attempt to pay Intralytix's debt directly to MeyerFlyer arise between Spencer Trask and MeyerFlyer. MeyerFlyer is not a party to this action and, therefore, any claims relating to MeyerFlyer's bad faith are not at issue here. The fact remains that the Senior Loan has not been paid and satisfied and, as a result, Intralytix continues to be bound by the Subordination Agreement. Consequently, Spencer Trask is barred from bringing this claim.

Spencer Trask argues that the terms of the Subordination Agreement contemplate payment of the Senior Loan by Spencer Trask. It cites a provision of the Subordination Agreement which states that "[Spencer Trask] waives any and all rights to be subrogated to the rights of [MeyerFlyer] with the respect to any of the [Intralytix] debt [to MeyerFlyer] . . . until [such] debt is fully and finally paid in cash and satisfied." The court is of the opinion that this provision of the Subordination Agreement does not support Spencer Trask's claim and certainly

does not indicate that payment of the Senior Loan can be made by any party other than Intralytix or an authorized agent.

Spencer Trask also argues that Intralytix is not a party to the Subordination Agreement and therefore does not have the standing to enforce it. Although the Subordination Agreement was negotiated among and signed by Spencer Trask and Ecolab, Intralytix received and signed an "Acknowledgement of Borrower" attachment to the Subordination Agreement. This "Acknowledgement" provides that any payment from Intralytix to Spencer Trask in violation of the Subordination Agreement would constitute an event of default under the terms of the Senior Loan. Therefore, Intralytix is necessarily a party to the Subordination Agreement because its rights and duties are directly affected by that agreement. New York law also holds that a debtor may enforce the terms of a subordination agreement against a claim by a junior creditor. *See SCR Joint Venture LP v Warshawsky*, 559 F3d 133, 137 (2d Cir 2009).

Conclusion

For the above reasons, the court is of the opinion that the plaintiff is barred from pursuing its claim against the defendant based on the terms of the Subordination Agreement. The documentary evidence is sufficient to dispose of the claim.

Accordingly, it is

ORDERED that defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a) (1) is granted.

Dated: *September 27, 2011*

ENTER:

Melvin L. Schweitzer
 J.S.C. **MELVIN L. SCHWEITZER**
 J.S.C.