

**BDCM Opportunity Fund II, LP v Yucaipa Am.
Alliance Fund I, LP**

2013 NY Slip Op 31024(U)

March 8, 2013

Surpreme Court, New York County

Docket Number: 650150/2012

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Charles E. Ramos
Justice

PART 53

Index Number : 650150/2012
BDCM OPPORTUNITY FUND II, LP
vs.
YUCAIPA AMERICAN ALLIANCE
SEQUENCE NUMBER : 003
SUMMARY JUDGEMENT

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

Motion is decided in accordance with
accompanying Memorandum Decision.

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

Dated: 3/8/13

[Signature] J.S.C.

CHARLES E. RAMOS

- 1. CHECK ONE: CASE DISPOSED (checked) NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----x
BDCM OPPORTUNITY FUND II, LP, BLACK
DIAMOND CLO 2005-1 LTD, and
SPECTRUM INVESTMENT PARTNERS,
L.P.,

Plaintiffs,

Index No.: 650150/2012
Motion Seq.No. 3

- against -

YUCAIPA AMERICAN ALLIANCE FUND I,
LP, and YUCAIPA AMERICAN ALLIANCE
(PARALLEL) FUND I, LP,

Defendants.

-----x

Hon. Charles E. Ramos, J.S.C.

Plaintiffs move for a declaration regarding their rights under a Credit Agreement with respect to a series of amendments that plaintiffs claim have the effect of amending the definition of the term Requisite Lenders.

This decision amplifies this Court's transcript dated November 19, 2012.

The Credit Agreement itself is unambiguous and accordingly, summary judgment is appropriate.

Background.

Allied Systems Holdings, Inc. ("Allied" or "Borrower"), provides distribution and transportation services to the automotive industry, concentrating on the delivery of new vehicles to dealers.

In May of 2007, Allied and several related entities emerged

from bankruptcy under a plan of reorganization that, among other things, resulted in the defendant Yucaipa becoming the majority and controlling shareholder of Allied. In order to finance its emergence from bankruptcy, Allied obtained financing through a \$315 million credit facility consisting of a \$265 million senior secured first priority credit facility ("First Lien Facility"), and a \$50 million junior credit facility ("Second Lien Facility").

The First Lien Facility is governed by a Credit Agreement, and was comprised of (i) term loans in the aggregate principal amount of \$180 million (the "Term Loans"); (ii) a \$35 million revolving credit facility from CIT (the "Revolving Loan"); and (iii) a \$50 million synthetic letter of credit facility ("LC Facility"). The plaintiffs are Lenders under the Credit Agreement.

Under the Credit Agreement, those who are Requisite Lenders have the authority to make certain key decisions affecting the rights of all Lenders. As defined in the Credit Agreement, the Requisite Lenders consist of: one or more Lenders having or holding Term Loan Exposure, LC Exposure and/or Revolving Exposure and representing more than 50% of the sum of (i) the aggregate Term Loan Exposure of all Lenders, (ii) the aggregate LC Exposure of all Lenders and (iii) the aggregate Revolving Exposure of all Lenders.

Term Loan Exposure, a defined term that is incorporated into the definition of Requisite Lenders, is used to determine both who is eligible to be a Requisite Lender and to calculate the ratable shares necessary to become a Requisite Lender.

The Credit Agreement vests the Requisite Lender with the authority to direct the exercise of Lender remedies such as declaring Events of Default or commencing foreclosure on the collateral pledged to secure Allied's debt obligations. The Requisite Lender also has the authority to cause the Lenders to refrain from exercising such remedies in all but limited circumstances.

The plaintiffs contend that the Credit Agreement prohibits - absent the written consent of all affected Lenders - any modification or amendment of the Credit Agreement "if the effect thereof would . . . amend the definition of Requisite Lenders." They also contend that the Credit Agreement as initially drafted and executed foreclosed the possibility that Yucaipa could become a Requisite Lender. They assert that the only parties eligible to be a Requisite Lender are "Lenders" under the Credit Agreement and Eligible Assignees who subsequently become Lenders pursuant to an Assignment Agreement. Yucaipa, Allied's majority shareholder and Sponsor under the Credit Agreement, was neither a Lender nor was eligible to become a Lender through an Assignment Agreement because Lenders were the only ones permitted to assign

their Obligations to Eligible Assignees and the definition of Eligible Assignee provides that no sponsor [Yucaipa] could be an Eligible Assignee.

In April 2008, Yucaipa sought to acquire a portion of Allied's outstanding Credit Agreement Obligations. Due to the restrictions prohibiting Yucaipa from becoming an Eligible Assignee, Yucaipa could become eligible to acquire these Obligations only through an amendment to the Credit Agreement. (Credit Agreement §§ 1.1, 10.6(c).)

Yucaipa and Allied requested and received consent from a majority of the Lenders to amend the Credit Agreement - the Third Amendment - to permit Yucaipa to become a "Restricted Sponsor Affiliate" and purchase Term Loans under limited circumstances and conditions and with certain restrictions. (Third Amendment §§ 2.1, 2.7.)

The restrictions precluded Yucaipa from becoming the Requisite Lender or exerting control over the other Lenders. The Third Amendment prohibited Yucaipa from accumulating over (i) 25% of the aggregate principal amount of the Term Loan Exposure held by all Lenders or (ii) \$50 million of the principal amount of Term Loans. (Third Amendment §§ 2.7(c), 2.7(e).)

In addition, the Third Amendment prohibited Yucaipa from exercising any and all voting rights it would otherwise have as a Lender, including the right to consent to any amendment of the

Credit Agreement or the right to vote its debt in any Allied bankruptcy. (Third Amendment §§ 2.1(e), 2.7(a), 2.7(b), 2.7(e).)

By the terms of the Third Amendment, upon acquiring any interest in the Term Loans, Yucaipa "knowingly and irrevocably waive[d] any and all right to exercise any voting rights it would otherwise have as a Lender for all purposes under [the Credit Agreement]." (Third Amendment § 2.7(e)(iv).)

Further, the Third Amendment prohibited Yucaipa from including its Term Loans in any calculation of Term Loan Exposure when such calculation was required under the Credit Agreement. (Third Amendment § 2.1(e).) The amended definition of Term Loan Exposure in the Third Amendment provided that, "with respect to any provisions of this Agreement relating to voting rights of Lenders (including the right of Lenders to consent to or take any other action with respect to any amendment . . . of any provision of this Agreement . . .), the aggregate outstanding principal amount of the Term Loans of all Restricted Sponsor Affiliates shall be disregarded for purposes of this definition of 'Term Loan Exposure.'" (*Id.*)

Finally, the Third Amendment required Yucaipa to make a capital contribution to Allied of no less than 50% of the aggregate principal amount of any Term Loans that Yucaipa obtained within ten days after the date of such acquisition. (Third Amendment § 2.7(e).)

The Third Amendment also required Allied to deliver to the Administrative Agent monthly reports of the amount of Term Loans and Second Lien Term Loans acquired and held by Yucaipa, and the price paid for such loans. (Third Amendment § 2.3(a).)

Allied failed to deliver monthly reports of Yucaipa's holdings, which constituted an Event of Default under the Credit Agreement. (Forbearance Agreement.) Since August 2008, Allied has been in default under the Credit Agreement for, among other reasons, failing to make principal and interest payments, failing to comply with the financial covenants in the Credit Agreement and failing to deliver required financial information.

Allied and Yucaipa have acknowledged these defaults and recognized that the defaults entitled the Lenders to exercise rights and remedies under the Credit Agreement, including the right to accelerate Allied's debt.

On August 21, 2009, after Allied had been in default under its Credit Agreement Obligations for more than a year, Allied entered into the Purported Fourth Amendment with ComVest.

The effect of the Purported Fourth Amendment was to remove all of the restrictions imposed on Yucaipa's ownership of Obligations under the initial Credit Agreement and the Third Amendment, thereby purporting to make Yucaipa eligible to be Requisite Lender for the first time. (Purported Fourth Amendment §§ 2.1(b), 2.4.)

The Purported Fourth Amendment professes to amend the definition of "Term Loan Exposure" (a term expressly used in the definition of Requisite Lenders in the Credit Agreement) by deleting the language which excludes the amount of Term Loans held by Yucaipa from any calculation of the aggregate amount of Term Loans outstanding (Purported Fourth Amendment § 2.1(b); Ex. 5, Third Amendment § 2.1(c); Credit Agreement § 1.1.)

The Purported Fourth Amendment eliminates the provision of the Credit Agreement that prohibited Yucaipa from acquiring more than the lesser of 25% of the aggregate Term Loan Exposure, or \$50 million of the principal amount of Term Loans (Purported Fourth Amendment § 2.4(c); Third Amendment § 2.1(c); Credit Agreement § 10.6(c).)

The Purported Fourth Amendment also eliminates the restrictions placed on Yucaipa's right to vote as if it was a Lender, including the right to consent to any modification of the Credit Agreement and to vote its debt in bankruptcy (Purported Fourth Amendment § 2.4(a); Third Amendment § 2.7(a); Credit Agreement § 10.5) and it eliminates the requirement that Yucaipa was required to make a capital contribution to Allied of 50% of the aggregate principal amount of Term Loans it acquired. (Purported Fourth Amendment § 2.4(e); Third Amendment § 2.7(e).)

The Purported Fourth Amendment eliminates the restriction in the definition of Eligible Assignee in the Credit Agreement as

originally drafted that prohibited the Sponsor from becoming an Eligible Assignee. (Purported Fourth Amendment § 2.1(b); Third Amendment § 2.1(c); Credit Agreement § 1.1.)

On August 21, 2009, contemporaneously with the execution of the Purported Fourth Amendment, Yucaipa and ComVest executed a purported Assignment and Assumption Agreement, whereby Yucaipa agreed to acquire the obligations owned by ComVest for a combination of cash and future consideration.

As a result of the Purported Fourth Amendment and Assignment and Assumption Agreement with ComVest, Yucaipa contends that it is the Requisite Lender, with all the attendant powers to dictate the enforcement of, or forbearance from enforcement of, Lenders' rights and remedies.

Plaintiffs BDCM Opportunity Fund II, LP, Black Diamond CLO 2005-1 LTD, and Spectrum Investment Partners, L.P. (collectively, "Plaintiffs") move, pursuant to CPLR 3212 and 3001, for summary judgment declaring that the Purported Fourth Amendment to the Credit Agreement is not, and never was, effective, and that, as a result, Defendants are not, and may not act as, Requisite Lenders under the Credit Agreement.

Discussion

There is no credible dispute that under the terms of the Credit Agreement as initially drafted and executed, Yucaipa American Alliance Fund I, LP and Yucaipa American Alliance

(Parallel) Fund, L.P. (collectively, "Yucaipa"), as the "Sponsors" and controlling shareholders of Allied Systems Holdings, Inc. ("Allied" or "Borrower"), were absolutely prohibited from being a Lender to Allied, or an Eligible Assignee of a Lender, and thus could not acquire any Term Loans or other Obligations under the Credit Agreement.

There is also no dispute that under the Third Amendment to the Credit Agreement (which was approved by a majority of the Lenders at the request of Yucaipa and Allied), Yucaipa was permitted to acquire a certain limited amount of Term Loans under the Credit Agreement. However, the *quid pro quo* for permitting Yucaipa to acquire the Term Loans was that a cap was imposed on the amount of Term Loans that Yucaipa could acquire, and that any such Term Loans acquired by Yucaipa would be subject to substantial restrictions that among other things, would preclude Yucaipa from voting on any matter that could affect in any way the rights and remedies of the Lenders, or the Lenders' ability to obtain payment on their debt.

Plaintiffs contend that Yucaipa's scheme was in fact not successful because the purported Fourth Amendment violates the Credit Agreement and the Third Amendment, and thus never became effective.

Yucaipa is trying to claim ownership of a sufficient amount of the Term Loans so as to declare itself a Requisite Lender, a

designation that would allow Yucaipa to make decisions that would be binding on all Lenders, including the ability to direct the Agent for the Lenders to exercise (or forbear from exercising) rights and remedies against Allied and the other Loan Parties upon the occurrence and during the continuance of an Event of Default (which has been the case here since 2008).

Plaintiffs, who are Lenders under the Credit Agreement, seek a declaration that the purported Fourth Amendment to the Credit Agreement - which ostensibly strips out all of the restrictions incorporated into the Credit Agreement by the Third Amendment on the ability of Defendants as the "Sponsor" and majority shareholders to acquire more than a majority of the Term Loans and become the "Requisite Lender" - is ineffective, because Allied failed to obtain (and did not even seek) the unanimous Lender consent required by the Credit Agreement to remove these restrictions.

The plaintiffs are correct that the Credit Agreement unambiguously requires unanimous consent - and because it admittedly was not obtained - no material issue of fact exists, and Plaintiffs' Motion should be granted.

What the defendants did was to cause Allied to enter into an agreement with ComVest Investment Partners III, L.P. ("ComVest") - who then held a majority of the outstanding Obligations under the Credit Agreement - pursuant to which Yucaipa agreed to

purchase the Obligations held by ComVest for a combination of cash and future consideration to ComVest (calculated as a percentage of Yucaipa's ultimate recovery on the Obligations purchased). That transaction, however, could not be consummated so long as the restrictions on Yucaipa's acquisition, ownership and voting of Obligations, as set forth in the Third Amendment, remained effective. So, as a condition to the consummation of the transaction, Yucaipa required that an amendment to the Credit Agreement be entered into by Allied and ComVest eliminating the restrictions.

Thus, on August 21, 2009, Yucaipa, as controlling shareholder of Allied, caused Allied to enter into that certain Amendment No. 4 to Credit Agreement with ComVest (the "Purported Fourth Amendment"), which purported to eliminate any restrictions on Yucaipa's ownership of Allied debt (including those that existed in the Credit Agreement as initially drafted and executed), including the provision disregarding Yucaipa-held debt in calculating "Term Loan Exposure," which would otherwise have prevented Yucaipa from becoming the Requisite Lender. After the Purported Fourth Amendment was signed, Yucaipa consummated its transaction with ComVest and acquired a majority of the Obligations - thereby seizing control of the Lenders' rights and remedies under the Credit Facility.

This was, of course, flatly prohibited under the Credit

Agreement absent the consent of all of the Lenders, and thus the Purported Fourth Amendment is invalid and of no force or effect.

Section 10.5 of the Credit Agreement, which governs amendments to the Credit Agreement, unambiguously states in clause (b) that "[w]ithout the written consent of each Lender . . . affected thereby, no amendment, modification, termination or consent shall be effective if the effect thereof would: . . . (ix) amend the definition of 'Requisite Lenders' . . . "

"[T]he intention of the parties may be gathered from the four corners of the instrument, interpretation of the contract is a question of law . . . [and] no trial is necessary to determine the legal effect of the contract." *Gen. Phoenix Corp. v Cabot*, 300 N.Y. 87, 92 (1949).

In fact, the Purported Fourth Amendment "affected" every Lender and had the "effect" of amending the definition of Requisite Lenders. A material element of the definition of Requisite Lenders is Term Loan Exposure, which is utilized both to define which Lenders may become the Requisite Lender (or be part of a group comprising Requisite Lenders) and to calculate whose obligations may be counted in calculating the amount that a Lender or group of Lenders must hold in order to be the Requisite Lender(s).

There is no doubt that the Purported Fourth Amendment's changes to the definition of Term Loan Exposure had "the effect

of" changing the definition of Requisite Lenders by allowing the Yucaipa-owned Obligations to be included in the calculation of Term Loan Exposure when, under the Third Amendment, they had previously been expressly excluded.

By the express terms of the Credit Agreement, the Purported Fourth Amendment could only become effective upon the unanimous consent of the Lenders. It is undisputed that Allied did not obtain - or even seek - consent from any Lender other than ComVest, whom Yucaipa paid and indemnified.

For their part the defendants contend that there are many factual issues. There are none. This is a case of contract interpretation. The defendants argue that summary judgment should not be granted because fact discovery is necessary for its *res judicata* defense, which is based upon the settlement of a Georgia Action, a case in which Plaintiffs were not parties. The Settlement Agreement - which was negotiated and executed by Defendants - demonstrates that any claims by Plaintiffs were not dismissed in that Georgia Action.

This Court does not consider the existence of the Settlement Agreement to be a viable defense. It was entered into by CIT to settle claims and defenses it (CIT) had on its own in the Georgia Action. CIT expressly limited the release it gave under the Settlement Agreement to itself by providing that the limited release was made solely by CIT on its own behalf and not in a

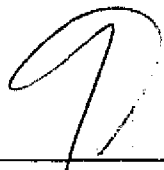
representative capacity on behalf of any other person and thus it could not constitute a release by any other person. In addition, the parties to the Settlement Agreement, including Defendants here, made it clear that nothing in the Settlement Agreement released any claims belonging to anyone other than the parties to the Settlement Agreement by stating that "for the avoidance of doubt and notwithstanding anything herein to the contrary, nothing in this Agreement shall release any claims, actions, causes of action . . . whatsoever belonging to any person or entity other than the Parties to this Agreement (and each of their respective personal representatives, successors and assigns.)" The signature blocks in the Settlement Agreement show, that CIT signed, through its attorneys, only in its individual capacity.

The defendants' contention that Georgia law requires the Plaintiffs to appear in the Georgia Action to attack the judgment is unworthy of comment.

This Court considers the balance of the defendants' defenses to be unavailing.

Accordingly, it is Ordered and Adjudged that the Purported Fourth Amendment is not, and never was, effective under the plain terms of the Credit Agreement, Yucaipa is not the Requisite Lender and Plaintiffs are entitled to summary judgment as a result.

Dated: March 8, 2013



J.S.C.
CHARLES E. RAMOS