

CNH Diversified Opportunities Master Account, L.P. v Cleveland Unlimited, Inc.
2013 NY Slip Op 31574(U)
July 12, 2013
Supreme Court, New York County
Docket Number: 650140/2012
Judge: Barbara R. Kapnick
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

BARBARA R. KAPNICK

PRESENT: J.S.C. Justice

PART 39

Index Number : 650140/2012
CNH DIVERSIFIED
vs
CLEVELAND UNLIMITED, INC.
Sequence Number : 001
SUMMARY JUDGEMENT LIEU COMPLAINT

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: 7/12/13

Signature of Barbara R. Kapnick, J.S.C.

- 1. CHECK ONE: CASE DISPOSED
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: IA PART 39**

-----X
CNH DIVERSIFIED OPPORTUNITIES MASTER
ACCOUNT, L.P.; AQR DELTA MASTER ACCOUNT,
L.P.; AQR DELTA SAPPHIRE FUND, L.P.; and
AQR FUNDS - AQR DIVERSIFIED ARBITRAGE FUND,

Plaintiffs,

DECISION/ORDER
Index No. 650140/12
Motion Seq. No. 001

- against -

CLEVELAND UNLIMITED, INC.; CLEVELAND
UNLIMITED AWS, INC., f/k/a TRIAD AWS, INC.,
CLEVELAND UNLIMITED LICENSE SUB, LLC;
CLEVELAND PCS REALTY, LLC; CSM WIRELESS,
LLC; CSM COLUMBUS (OH) OPERATING SUB,
LLC; CSM INDIANAPOLIS OPERATING SUB, LLC;
CSM COLUMBUS (IN) OPERATING SUB, LLC; CSM
NEW CASTLE OPERATING SUB, LLC; CMS
CANTON OPERATING SUB, LLC; CMS
YOUNGSTOWN OPERATING SUB, LLC; CSM
CLEVELAND OPERATING SUB, LLC; CSM
COLUMBUS (OH) LICENSE SUB, LLC; CSM
INDIANAPOLIS LICENSE SUB, LLC; CSM
COLUMBUS (IN) LICENSE SUB, LLC; CSM NEW
CASTLE LICENSE SUB, LLC; CSM CANTON
LICENSE SUB, LLC; CSM YOUNGSTOWN
LICENSE SUB, LLC; CSM CLEVELAND LICENSE
SUB, LLC; and CUI HOLDINGS, LLC

Defendants.

-----X
BARBARA R. KAPNICK, J.:

Plaintiffs CNH Diversified Opportunities Master Account, L.P.,
AQR Delta Master Account, L.P., AQR Delta Sapphire Fund, L.P., and
AQR Funds - AQR Diversified Arbitrage Fund (together, the "Funds")
move, pursuant to CPLR 3213, for summary judgment in lieu of
complaint to recover the principal and interest allegedly due on
certain Senior Secured Floating Rate Notes, due in 2010 (the
"Notes"), issued by defendant Cleveland Unlimited, Inc. (the

"Company") and guaranteed by the other defendants (the "Guarantors").

Background

Plaintiffs allege that they are the owners and holders of \$5 million in Notes that were issued by the Company, a regional wireless telecommunications carrier¹ based in Ohio, and guaranteed by the Guarantors. The Notes were allegedly issued pursuant to an Indenture, dated as of December 15, 2005, by and among the Company, the Guarantors, and U.S. Bank National Association, as Trustee and Collateral Trustee (the "Indenture").¹ Sections 2.01 and 2.02 of the Indenture authorized the Company to execute the Notes in an aggregate principal amount of up to \$150 million, "substantially in the form" as a form Note, which was attached as Exhibit A to the Indenture (the "Form Note").

The Form Note includes an unconditional promise to pay the Note's principal amount on December 15, 2010.² (Form Note at A-2.) The Form Note also provides that the Company promises to make quarterly interest payments to Noteholders at a rate of LIBOR plus

¹ Contemporaneous with the Indenture, the parties also executed a Collateral Trust Agreement and a Security Agreement. (Asness Aff., Exs. 3 and 4.) The parties subsequently executed three supplements to the Indenture dated July 2, 2008, January 27, 2010, and December 30, 2010. (Asness Aff., Exhs. 5, 6 and 7.)

8.25%, reset quarterly, commencing on March 15, 2006. (*Id.* at A-4, ¶ 1.) The Form Note further provides that, under certain circumstances, the Noteholders shall be entitled to receive certain Additional Interest payments pursuant to, and in accordance with, the terms of the Registration Rights Agreement. (*Id.* at A-8, ¶ 8.)² Additionally, Section 4.01 of the Indenture requires the Company to pay further interest, at the rate of 1% per annum in excess of the rate of interest set forth in the Note, for any overdue principal or overdue installments of interest and/or Additional Interest.

According to the affidavit of Bradley D. Asness ("Asness"), a principal and Chief Legal Officer of non-party AQR Capital

² Under the terms of the Indenture (section 4.17), the Notes were not initially required to be registered with the U.S. Securities and Exchange Commission at the time of issue. However, pursuant to the terms of the Registration Rights Agreement, referenced in the Indenture and the Form Note, the Company was obligated to use its best efforts to file a registration statement, and to exchange the initial Notes for registered Notes having substantially the same terms. Accordingly, the Form Note provides that:

8. Registration Rights

... The Holders of the Initial Notes shall be entitled to receive certain Additional Interest payments in the event such exchange offer is not consummated and upon certain other conditions, all pursuant to and in accordance with the terms of the Registration Rights Agreement.

Management, LLC, the Funds acquired \$5 million of the Notes on the secondary market in or about April 2010, and became Noteholders as a result of those purchases. (Asness Aff. ¶ 18.) According to plaintiffs, the Company failed to exchange the initial Notes for a new issue of notes registered with the SEC, and, therefore, the Noteholders were entitled to receive Additional Interest, at a rate of 2% per annum, in addition to the stated interest in the Note. (Asness Aff. ¶ 15.)

The Funds received the scheduled payments of interest on June 15, September 15, and December 15, 2010. (Asness Aff. ¶ 20.) However, the Funds did not receive the return of principal on the Notes' December 15, 2010 maturity date. (*Id.* at ¶ 21.)

Instead, the Company, upon determining that it would be unable to repay the principal of the Notes when due, entered into negotiations with an ad hoc committee of Noteholders, including the Funds, to avoid the consequences of a default. (*Id.* at ¶¶ 30-33.) On or about December 30, 2010, the Company, the Guarantors, the Trustees, and the Noteholders, including the Funds, entered into a Forbearance, Amendment and Limited Waiver Agreement (the "Forbearance Agreement"), in which the Trustees agreed to forbear from exercising the rights and remedies available to them under the Indenture and Notes until April 30, 2011. (*Id.* at ¶¶ 34-36.) As

part of the Forbearance Agreement, the parties contemplated a proposed sale and transfer of all of the Company's stock to a new company to be established by the Noteholders. (*Id.* at ¶ 41.) To that end, a Purchase and Sale Agreement was executed by all of the parties concurrently with the Forbearance Agreement. (*Id.*) In addition, CUI Holdings, LLC., which then held 100 percent of the equity in the Company, became an additional guarantor under the Notes, pledging its entire equity interest in the Company as security. (*Id.* at ¶ 40.)

Ultimately, the contemplated purchase and sales transaction failed to close. (*Id.* at ¶ 41.) The Company also failed to pay the principal and interest that had accrued on the Notes as of the end of the Forbearance period. (*Id.* at ¶ 38.) On June 1, 2011, counsel for the Noteholders sent out an e-mail to each of the Noteholders' representatives, proposing an alternative transaction known as a "strict foreclosure" under Uniform Commercial Code ("UCC") §§ 9-620 and 9-622, by which the Noteholders could acquire the Company's stock while "maintain[ing] the structure of the consensual deal." (Asness Aff. ¶¶ 42-43; Ex. 9 at 1.)

After reviewing this alternative proposal, on June 3, 2011, counsel for the Funds sent a letter advising that they would "not join or in any way consent to the proposed transaction." (Asness

Aff. ¶ 44, Ex. 10.) The letter further advised that, in accordance with their rights under Section 6.07 of the Indenture, the Funds would not consent to any impairment or effect on their rights to receive payment of principal and interest on their Notes, or to bring suit to enforce those rights.³ (*Id.* at ¶ 45; Ex. 10.)

Despite the Funds' objection, the majority of Noteholders approved the transaction, and a "Strict Foreclosure Agreement And Joint Instructions to Escrow Agent" was executed on September 8, 2011. (Asness Aff. ¶ 47; Ex. 11.) Pursuant to that agreement, CUI Holdings transferred its 100% equity interest in the Company to the Collateral Trustee for the benefit of Noteholders, in full and final satisfaction of the Company's and the Guarantors' obligations under the Notes. (Asness Aff. ¶ 48; Ex. 11.) To facilitate the distribution of stock to Noteholders, the Company issued new stock certificates. (Asness Aff. at ¶ 49.) Thereafter, 96.633333 shares of the stock were issued to non-party CUI Acquisition Corp., a

³ Section 6.07 of the Indenture provides that:

Notwithstanding any other provision of this Indenture, the right of any Holder to receive payment of principal of, premium, if any, and interest and Additional Interest, if any, on a Note, on or after the respective due dates expressed in such Note, or to bring suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such Holder.

corporation owned by the majority Noteholders, and 3.333334 of the remaining 3.36667 shares of stock were transferred to the Funds. (*Id.* at ¶¶ 49-80.) The Funds received their shares of stock, which they currently hold in their custodial accounts. (*Id.* at ¶ 50.) Plaintiffs allege that these shares are worth far less than the amounts due to them under the Notes. (*Id.* at ¶ 51.)

Plaintiffs contend that the transfer of Company stock to the Funds, pursuant to the strict foreclosure, did not satisfy defendants' obligations to the Funds, because the Funds did not consent to any impairment of their rights to receive a cash payment of the principal and interest due on their Notes.

In January 2012, the Funds filed and served the instant motion for summary judgment in lieu of complaint, in which they now seek to recover the \$5 million principal amount of their Notes, together with all applicable contractual interest, including Additional Interest, and the costs and disbursements of this action, including reasonable attorneys' fees and expenses.

Discussion

Plaintiffs argue that their motion for summary judgment in lieu of complaint should be granted because the Notes that were issued by the Company, and guaranteed by the Guarantors, are

classic examples of instruments for the payment of money only. Plaintiffs note that New York courts routinely grant motions for summary judgment in lieu of complaint on similar instruments. Further, plaintiffs argue that they are entitled to recover the full face value of their Notes, plus interest, because they never consented to the strict foreclosure; and, therefore, the Strict Foreclosure Agreement does not extinguish the Company's or the Guarantors' obligations to pay the principal and interest on the Notes owned by the Funds.

Defendants argue that plaintiffs' motion should be denied, because the Indenture and Collateral Trust agreements clearly granted the Trustee the exclusive right to exercise all rights and remedies with respect to the collateral at the direction of a majority of Noteholders. Thus, all of the Company's and the Guarantors' payment obligations under the Notes have been satisfied through the strict foreclosure transaction. Moreover, defendants argue that the Funds' interpretation of Section 6.07 of the Indenture is commercially unreasonable and at odds with the precepts of contract interpretation. Defendants alternatively argue that the relevant provisions of the Agreements are reasonably susceptible to more than one interpretation, and, thus, ambiguous. Defendants also contend that plaintiffs' motion should be denied because the Funds have failed to make a prima facie showing that

the Notes are instruments for the payment of money only, and have failed to put before this Court all of the terms of the Notes.

CPLR 3213 provides in relevant part that "[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint" The purpose of CPLR 3213 is "to provide quick relief on documentary claims so presumptively meritorious that 'a formal complaint is superfluous, and even the delay incident upon waiting for an answer and then moving for summary judgment is needless.'" *Weissman v. Sinorm Deli*, 88 NY2d 437, 443 (1996) (citation omitted). "The prototypical example of an instrument within the ambit of the statute is [] a negotiable instrument for the payment of money - an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite time." *Id.* at 444. However, "[t]he instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document." *Id.*

Furthermore, to prevail on a motion for summary judgment in lieu of complaint based on a note, plaintiffs are required "to present evidence that defendants executed the note[s] and defaulted thereon." *Kehoe v. Abate*, 62 AD3d 1178, 1180 (3d Dep't 2009)

(citations omitted).

Here, plaintiffs fail to provide the Court with the executed Notes and instead only provide the Form Note.⁴ Although execution of the Notes was authorized and expressly contemplated by the Indenture, plaintiffs do not contend that the Indenture itself is an instrument for the payment of money only. Therefore, the executed Notes are required to even make out a prima facie case on a motion for summary judgment in lieu of complaint.

Furthermore, it is necessary to look to outside proof, *i.e.*, the allegations in the Asness Affidavit, to determine the face value of the Notes on which plaintiffs seek to recover. The Court would also have to look to outside proof to determine the amount of contractual interest due on the Notes, in particular, the Additional Interest that was to be paid pursuant to, and in accordance with, the terms of the Registration Rights Agreement, which plaintiffs likewise have failed to produce.

Furthermore, granting summary judgment in lieu of complaint would not be appropriate since plaintiffs do not dispute that they

⁴ According to the Asness Affidavit, plaintiffs are "Holders" of the Notes, defined in Section 1.01 of the Indenture to mean "the Person in whose name a Note is registered on the Registrar's books." However, plaintiffs have produced no documentary proof of such registration.

received and retained the Company stock that was acquired through the strict foreclosure. Plaintiffs contend, nevertheless, that because the Company undertook the strict foreclosure action without the Funds' consent, the transfer of Company stock to the Funds did not terminate their rights to full payment. At the same time, plaintiffs acknowledge that the Company may claim the stock as a set-off against any payment that might be due under the Notes.⁵ Although evidence of a setoff does not necessarily preclude application of CPLR 3213, this is only the case where there is otherwise no genuine dispute about the amount due. See *Craven v. Rigas*, 71 AD3d 1220, 1223 (3d Dep't 2010), *lv to app den* 14 NY3d 713 (2010).

Additionally, the Court recognizes that defendants' substantive arguments in opposition to this motion go to whether or not the various agreements at issue here permit the defendants or the indenture trustee to compromise plaintiffs' rights to collect on the notes when plaintiffs did not consent to the strict foreclosure transaction. This Court, however, will not reach these issues at this time, since it is finding that this matter is not properly brought under CPLR 3213.

⁵ The Court notes that the stock has yet to be valued by the parties.

Accordingly, plaintiffs' motion for summary judgment in lieu of complaint is denied. Plaintiffs shall serve a formal complaint upon defendants' counsel within 30 days of notice of e-filing of this decision, and defendants shall have 30 days to serve an Answer or otherwise move with respect to the Complaint.

This constitutes the decision and order of this Court.

Dated: *July 12*, 2013



BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.